Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2023/3855**

Re: **YVBM**

APPLICANT

And **Minister for Immigration, Citizenship, and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **Deputy President Justin Owen**

Date: **21 August 2023**

Place: **Sydney**

The Tribunal sets aside the reviewable decision and substitutes a decision that the mandatory cancellation of the Class XB Subclass 200 Refugee (Permanent) visa is revoked.

.....[SGD].....

Deputy President Justin Owen

CATCHWORDS

MIGRATION – mandatory cancellation of Class XB Subclass 200 Refugee (Permanent) Class visa under section 501(3A) – where Applicant does not pass the character test - Applicant has substantial criminal record –nature and seriousness of offending - family violence – best interests of the child - international non-refoulment obligations - whether the discretion to revoke the visa cancellation under section 501CA (4) should be exercised – consideration of Ministerial Direction No. 99 - decision under review is set aside and substituted

LEGISLATION

Migration Act 1958 (Cth)

CASES

Afu v Minister for Home Affairs [2018] FCA 1311
Ali v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 559
Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 646
BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96
FYBR v Minister for Home Affairs [2019] FCA 500
FYBR v Minister for Home Affairs [2019] FCAFC 185
HZCP v Minister for Immigration and Border Protection [2019] FCAFC 202
Minister for Home Affairs v Omar [2019] FCAFC 188
Pearson v Minister for Home Affairs [2022] FCAFC 203
PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1235
Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17
PNLB and Minister for Immigration and Border Protection (Migration) [2018] AATA 162
Suleiman v Minister for Immigration and Border Protection [2018] FCA 594
Uelese v Minister for Immigration and Border Protection [2016] FCA 348
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIAL

Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

Deputy President Justin Owen

01 September 2023

INTRODUCTION

1. The Applicant seeks a review of the decision by a delegate of the Minister for Home Affairs ("**the Respondent**") made under section 501CA(4) of the Migration Act 1958 (Cth) ("**the Act**") on 26 May 2023, not to revoke the mandatory cancellation of his Class XB Subclass 200 Refugee (Permanent) visa ("**the Visa**").

2. The Applicant is a male Iranian national born in 1989. At the time of this decision, he is 34 years of age. The Applicant has resided in Australia for 12 years and nine months, having arrived in November 2012 as the holder of a Class XB Subclass 200 Refugee (Permanent) visa when he was 23 years of age.

3. The Applicant's visa was cancelled on 28 September 2022 under section 501(3A) of the Act on the basis that he did not pass the character test. The Applicant was duly notified of the mandatory cancellation decision and was invited to make representations in an effort to revoke that decision. On 24 October 2022, the Applicant made representations seeking revocation of the cancellation decision. On 26 May 2023, a delegate of the Respondent refused to revoke the mandatory cancellation made on 28 September 2022. There followed an application to the Tribunal on 2 June 2023 wherein the Applicant sought review of the delegate's refusal to revoke the decision made on 26 May 2023.

4. Sections 501(6)(a) and 501(7)(c) of the Act provide that a person does not pass the character test if they have been sentenced to a term of imprisonment of 12 months or more. The Applicant fails the character test on account of his conviction on 14 December 2020 in the Fairfield Local Court of New South Wales for the offence of *Common assault – T2*, for which he was sentenced to a term of imprisonment of 12 months. On 9 September 2022, the Applicant was convicted in the Fairfield Local Court of New South Wales for the offence of *Contravene prohibition/restriction in AVO (Domestic)* and three counts of *Common*

assault (DV) – T2, for which he was sentenced to an aggregate term of imprisonment of nine months.

5. In the Applicant's submission to the Tribunal of 7 July 2023, he accepts that he does not pass the character test.

6. The issue before the Tribunal is whether the Applicant passes the character test as required under section 501CA(4)(b)(i) of the Act, and if not, whether there is 'another reason' to revoke the mandatory visa cancellation pursuant to section 501CA(4)(b)(ii) of the Act.

7. The hearing was held on 14 August 2023. The Tribunal received oral evidence from the Applicant and his de facto partner.

8. For the following reasons, the Tribunal sets aside the reviewable decision and substitutes a decision that the mandatory cancellation of the Class XB Subclass 200 Refugee (Permanent) visa is revoked.

LEGISLATIVE FRAMEWORK

9. Revocation of the mandatory cancellation of visas is governed by subsection 501CA(4) of the Act. Relevantly, this provides that:

> *The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*

10. The Applicant duly made the representations required by paragraph 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. This requires the Tribunal to address these two issues:

(a) whether the Applicant passes the character test; and, if not,

(b) whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

Does the Applicant Pass the Character Test?

11. The character test is defined in section 501(6) of the Act. Relevantly, paragraph 501(6)(a) of the Act states that a person does not pass the character test if the person has a substantial criminal record, as defined in section 501(7) of the Act. Paragraph 501(7)(c) of the Act provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

12. The Tribunal has been provided with the report of the Australian Criminal Intelligence Commission dated 14 April 2023 setting out the Applicant's offending and convictions. Information in the Respondent's SFIC, which the Tribunal accepts as accurate, indicates that the Applicant has been convicted of a range of offences since 2015. On 14 December 2020 in the Local Court of New South Wales at Fairfield, the Applicant was convicted of *common assault -T2* for which he was sentenced to a term of 12 months imprisonment.

13. The Tribunal finds that the Applicant has a "*substantial criminal record*" and, therefore, he does not pass the character test. The requirements of subparagraph 501CA(4)(b)(i) of the Act are not met. This is not disputed by the Applicant. The Tribunal must consider whether "there is another reason why the original decision should be revoked".

Is there another reason why the original decision should be revoked under subsection 501CA(4)?

14. In considering whether to exercise this discretion, the Tribunal is bound by subsection 499(2A) to comply with any directions made under the Act. In this case, *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation*

of a visa under section 501CA ("**the Direction**") has application.[1]The Direction is binding on the Tribunal in performing its functions or exercising powers under section 501 of the Act.

15. The Direction sets out the principles that provides a framework on how decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant or revoke mandatory cancellation decisions. For the purposes of deciding whether to refuse or cancel a non-citizen's visa or whether or not to revoke the mandatory cancellation of a non-citizen's visa, paragraph 5.2 of the Direction contains several principles that must inform a decision maker's application of the considerations identified in Part 2 where relevant to the decision.

16. The principles that are found in paragraph 5.2 of the Direction may be briefly stated as follows:

    (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

    (2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

    (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

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[1] On 15 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90. Direction 90, in turn, was replaced by Direction 99 on 3 March 2023.

(4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.

(5) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.

(6) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

17. Section 6 of the Direction provides that:

> *Informed by the principles in paragraph 5.2, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.*

18. Section 8 of the Direction sets out five primary considerations ("**Primary Considerations**") that the Tribunal must take into account. The Primary Considerations include:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the strength, nature and duration of ties to Australia;

(4) the best interests of minor children in Australia; and

(5) expectations of the Australian community.

19. Section 9 of the Direction sets out five other considerations ("**Other Considerations**") which must be taken into account. The Other Considerations are:

a) Legal consequences of the decision;

b) extent of impediments if removed;

c) impact on victims; and

d) impact on Australian business interests.

20. The Tribunal notes the importance of the Other Considerations being "*other*" considerations, as opposed to "*secondary*" considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594:

> *"…Direction 65 [now Direction 99] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply."*[2]

[2] *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 [23] (Colvin J).

21. In this case, it is not in dispute that the Applicant has made representations to the delegate about the revocation of the cancellation of his visa. The requirements of paragraph 501CA(4)(a) are met.

22. The Tribunal has had regard to the Applicant's representations, as well as his submissions and evidence to the delegate. In addition, the Tribunal also has regard to the evidence subsequently provided to the Tribunal by the Applicant and the Respondent, and the Applicant's witness.

BACKGROUND FACTS

23. The Applicant was born in 1989 in Iran. He completed his school studies before enrolling in university. Showing a propensity for soccer, he became a professional footballer. The Applicant stated he had taken part in mass demonstrations in 2007 and 2008 against the Iranian government. This activity led to his arrest and detention. He fled to Turkey on 23 November 2009 and spent some two years and eight months there. The Applicant stated that whilst in Turkey he went to the United Nations offices where he was ultimately assessed as a political refugee. The Applicant stated he was subsequently contacted by the Australian Embassy where he went for interviews in relation to a Class XB Subclass 200 Refugee (Permanent) visa, which was subsequently granted. He arrived in Australia in November 2012 and has resided ever since.

24. The Applicant claims he remained in gainful employment during his time in Australia, mainly in the construction industry. In 2019 the Applicant entered a relationship with his de facto partner, Ms SA, an Australian citizen who lives in Fairfield. They had 2 children together, Miss VD (born in 2020) and Master TD (born in 2022). The Applicant's mother and sister remain in Iran, with the Applicant stating his sister remains of interest to the Iranian authorities for her own past political behaviour. His father is deceased whilst his brother resides in Germany. In her own oral testimony to the Tribunal, the Applicant's partner SA spoke in some detail about the Applicant's love and support for herself and their children, both from a financial and emotional perspective. SA has another daughter, IF, born in 2012 to a previous relationship. The Applicant also has links to Australia through SA's cousin, Ms BG, whom he has known for eight years.

25. Before he was incarcerated, and then detained in immigration detention, the Applicant was in full-time employment and undertook volunteer work at the Fairfield Food Service. Character references from October 2022 and April 2023 have been provided from the Applicant's employer, AB stating at the time of writing, the Applicant had been working with AB for six years and is a hard-working and valuable member of the company. The Applicant also provided a number of character references from Australian citizens and Australian permanent residents attesting to his good character and positive contribution to Australia through his participation in the workforce and community service. These character references also go to show the network of community ties the Applicant has established in Australia.

26. The Applicant's partner states that it is her belief that the Applicant suffers from depression. In the sentencing remarks made by the Magistrate in the Local Court of New South Wales at Fairfield in relation to the Applicant's conviction of 14 December 2020, the Magistrate stated the Applicant suffers from severe depression, anxiety, panic attacks, adjustment disorders and post-traumatic stress disorder. It is also submitted by the Applicant, through his representative to the Tribunal, that the Applicant suffers from stress and adjustment reaction disorder and complex post-traumatic stress disorder.

27. In the IHMS medical report dated 1 March 2023, the Applicant referred to his past experiences in Iran, including his treatment by his parents and his father who was described as being physically abusive towards the Applicant. The Applicant also refers to his past drug abuse of ice, heroin and fentanyl since 2015, and issues in his relationship with his partner. The IHMS medical report dated 1 March 2023 suggests the Applicant is meeting with counsellors regularly and discussing his issues, and that he has been prescribed anti-depressant medication. The Applicant submitted to the Tribunal through his representative that he is receiving treatment for his mental health issues from both a counsellor and a psychologist.

28. In the Applicant's statement of 15 April 2023, he states he has completed Smart Recovery courses that focus on self-control, family responsibility, family care, and anger management, and meets with a psychologist and a counsellor on a weekly basis and has been taking his prescribed medication. The Applicant submitted to the Tribunal, through his representative, that he has completed a program in relation to domestic violence, he has undertaken a parenting program, child safety for parents, healthy relationship, positive

parenting techniques, stress management and life coaching. The Applicant provided certificates of course completion for Domestic Violence, Stress Management, Positive Parenting Techniques, Health Relationships and Anger Management.

29. In a Client Incident Report dated 4 February 2023, it is stated the Applicant attempted to bring contraband items into the detention centre in the form of five vapes concealed in plastic lolly jars.

30. The Applicant submitted to the Tribunal that he cannot go back to Iran as he will be persecuted and risks facing serious harm in Iran. He states that he is a political refugee as he had organised and participated in a political protest against the Iranian administration. He states he was previously tortured by the Iranian authorities in Ahvaz, Iran. He says that following a political protest in which he participated, he was 'taken'. He states:

> *I was placed in a small room that was dark. I was hung by my legs. I was the subject of physical violence. I was beaten with a metal object. A cloth was placed over my face. The torturer then proceeded to place water all over my face and mouth to choke me. I was tasered.*
>
> *Subsequently, after a period, I was permitted to leave. My father gave the authorities house papers in exchange for my release. Subsequently, after this occurred, I fled Iran and went to Turkey.*

Criminal history

31. The Applicant has an extensive criminal history in Australia involving crimes of violence and family violence. He committed his first offence in Australia, a motoring offence that involved exceeding the speed limit by over 30km/h, in 2014, after first arriving in Australia in 2012. The Applicant has previously been placed on Community Corrections Orders, Intensive Corrections Orders and bonds in an attempt to deter him from committing further acts of family violence which he has continually breached.

18 June 2015 conviction

32. On 18 June 2015, the Applicant was convicted in the Parramatta Local Court of New South Wales for the offences of *Common assault (DV) – T2* and *Armed w/i commit indictable offence – T1*, for which he was ordered to serve 150 hours of community service. The Applicant was also convicted for the offences of *Fail to appear in accordance with bail acknowledgement*, for which he received a s 10A Conviction, and *Destroy or damage property <=$2000 (DV) – T2* for which he was issued a $500 fine.

Background facts related to the 18 June 2015 conviction

33. On 20 October 2014, the Applicant became involved in a physical altercation with the victim. The Applicant and the victim were housemates. The Applicant knocked on the victim's door and when the victim opened the door, the Applicant punched the victim in the face, and pushed the victim in his chest, causing the victim to stumble backwards. The Applicant walked into the victim's room and proceeded to damage the victim's property. The Applicant then started to kick the victim in the stomach. The victim pushed the Applicant out of his bedroom, and the Applicant left the victim's bedroom and walked towards the communal kitchen. As he walked away the Applicant said "I will kill you, I will kill you".

34. The Applicant returned to the victim's room within seconds holding a 30cm knife. He held the knife above his head with the blade of the knife pointed towards the victim. The victim struggled to close his bedroom door, and the Applicant began pushing and banging on the other side of the door yelling "I will kill you". The victim managed to push the door shut and the victim called the Police. The Police attended the residence. The Applicant told the Police that the victim had taken pictures of him placing used needles in the bin, and sent the photos to the house owner. The Applicant said he was angry with the victim and approached him, but denied assaulting him, but admitted to damaging the victim's property. A witness who observed the last half of the incident provided a statement similar to that of the victim. A Provisional Apprehended Violence Order was served on the Applicant.

16 March 2016 conviction

35. On 16 March 2016, in the Parramatta Local Court of New South Wales, the Applicant was convicted for the offences of *Armed w/i commit indictable offence – T1* and *Common assault (DV) – T2*, for which he received a (call up) s 9 two-year bond for each offence.

6 April 2017 conviction

36. On 6 April 2017, in the Parramatta Local Court of New South Wales, the Applicant was convicted for the offence of *Common assault (DV) – T2* and *Armed w/I commit indictable offence – T1* for which he received a nine-month suspended sentence on entering a s 12 nine-month supervised bond and ordered to undertake counselling, educational development or drug and alcohol rehabilitation for each offence. He was also convicted for the offences of *Common assault – T2* for which he was issued a supervised nine-month s 9 bond and ordered to undertake counselling, educational development or drug and alcohol rehabilitation, and two counts of *Possess/attempt to, prescribed restricted substance* for which he was fined $400 for each count.

Background facts related to 6 April 2017 conviction

37. On 14 August 2016, the Applicant was with his partner inside his vehicle which was parked in Granville. The victim was sitting in his vehicle on the opposite side of the street. The Applicant crossed the street to use an ATM and his partner stayed with the vehicle. The Applicant claims the victim made derogatory remarks towards his partner. The Applicant approached the driver's door of the victim's vehicle, calling out "Why you say bad words to my girlfriend?". The victim was unsure what the Applicant was talking about and exited the vehicle. The Applicant pushed the victim in the chest a number of times. The victim attempted to push the Applicant away from him. The Applicant then began punching the victim, and struck the victim in the face at least once. The victim started fighting back. The Applicant and the victim became involved in a melee with punches being thrown and the parties grappling each other in the middle of the roadway. A witness attempted to break up the fight by pulling the two apart. This lasted for about 30 second.

38. Police who were patrolling the street attended the incident. The Police conducted checks on the Applicant and his vehicle. The Police located a bag containing liquid vials in the

Applicant's car. The Applicant said he injected the substance, he obtained the vials from a friend, and he did not have a prescription for the substance. The liquid was classified as either anabolic steroidal agents or testosterone.

7 June 2017 court appearance

39. On 7 June 2017, in the Parramatta Local Court of New South Wales, the Applicant's charge of *Drive motor vehicle while licence suspended* – 1st off was dismissed under s 10.

Background facts related to 7 June 2017 court appearance

40. On 18 February 2017, Police were performing traffic point duties in Granville. Police were diverting all south bound traffic on South Street into Diamond Avenue as the road was closed. The Applicant who was driving his vehicle was directed by Police to turn left into Diamond Avenue. The Applicant refused to turn left into Diamond Avenue. Police approached the Applicant and explained the situation. The Applicant became belligerent. Traffic began to build up behind the Applicant's vehicle due to him blocking the intersection. Police again directed the Applicant to turn left into Diamond Avenue. The Applicant remained stationary in his vehicle, and he continued to argue with Police. Police obtained a driver's licence from the Applicant and directed him to park his vehicle on Diamond Avenue, to which he complied. Police checks on the Applicant's driver's licence revealed that his licence was suspended until 6 May 2017 due to excess speed and demerit points. Police questioned the Applicant about the status of his driver's licence, to which the Applicant stated he knew he had received a good behaviour condition from the Roads and Maritime Service, and thought he was allowed to drive.

17 October 2018 conviction

41. On 17 October 2018, in the Parramatta Local Court of New South Wales, the Applicant was convicted of *Drive motor vehicle while licence suspended – 2nd+off* for which he was fined $750 and was disqualified from driving for six months.

Background facts related to 17 October 2018 conviction

42. On 24 October 2018, Police were at a service station in Parramatta. They observed the Applicant drive into the same service station. The Applicant was observed parking his vehicle partially over the disabled parking sign painted on the ground. The Applicant looked towards the police vehicle and moved his vehicle to avoid the disabled parking sign. The Applicant remained in the driver's seat as the front passenger exited the vehicle and walked into the service station. Shortly after, the Applicant exited the vehicle and walked into the service station and continued to observe the Police. The Applicant and the passenger returned to the vehicle, however the passenger now sat in the driver's seat and the Applicant sat in the front passenger seat. The Police conducted checks on the vehicle which revealed that the Applicant's driver's licence was suspended. The Police approached the Applicant to put the allegation to him. The Applicant told the Police he knew his licence was suspended; however he had only driven for a couple of minutes from nearby units and was sorry.

<u>17 December 2019 conviction</u>

43. On 17 December 2019, in the Parramatta Local Court of New South Wales, the Applicant was convicted for the offence of *Common assault (DV) – T2*, for which he was fined $1000 and issued a 12-month supervised Community Correction Order.

<u>12 February 2020 conviction</u>

44. On 12 February 2020, in the Fairfield Local Court of New South Wales, the Applicant was convicted of the offence of *Resist officer in execution of duty – T2*, for which he was fined $600. He was also convicted for the offence of *Contravene prohibition/restriction in AVO (Domestic)*, for which he received an aggregate 10-month supervised *(attend on and be supervised by Community Corrections within 7 days)* Intensive Correction Order, he was ordered to engage with and take part in such counselling, domestic violence, gambling related rehabilitation as may be reasonably directed by Community Corrections, he was ordered not to enter any venue which holds a gaming licence for four months and he was issued a six-month curfew not to leave his residence between 10:00pm and 6:00am. He was also convicted for the offence of *Common assault (DV) – T2*, for which he received a 10-month supervised Intensive Correction Order, he was ordered to engage with and take

part in such counselling, domestic violence, gambling related rehabilitation as may be reasonably directed by Community Corrections, he was ordered not to enter any venue which holds a gaming licence for eight months and he was issued a six-month curfew not to leave his residence between 10:00pm and 6:00am for the offence of *Common assault (DV) – T2*.

Background facts related to the 12 February 2020 conviction -

45. On 16 December 2019, the Applicant and the victim who was the Applicant's partner, attended the Star Casino. The Applicant lost approximately $4000 and became angry towards the victim. The victim attempted to walk away from the Applicant. The Applicant proceeded to grab the victim by the back of the neck to prevent her from walking away. The victim later walked away from the Applicant and left the location. Later that day, the victim and a witness drove towards Westmead Hospital in the witness's vehicle. The Applicant sighted them and followed in his vehicle. The victim noticed she was being followed and called the Police. The Police located both vehicles and stopped the Applicant in his vehicle. When asked why the Applicant was following the victim, he stated that he "wanted to speak to her". The victim was also questioned by the Police and told Police "I am scared he's going to hit me, he has done it before and I'm so scared I can't go home". During this interaction, the Applicant continued to call out to the victim to prevent her from speaking to Police. The Applicant was arrested and conveyed to Parramatta Police Station. The Applicant was served with a Final Order at the Parramatta Local Court on 17 December 2019 naming the Applicant's partner as the person in need of protection.

46. On 31 December 2019, Police received information that the Applicant may have returned to residing with the victim. Police attended the victim's unit and informed the victim of their suspicions that the Applicant was breaching his Final Order and residing with the victim. The victim denied these claims stating she had not seen the Applicant since the Final Order was taken out. Police asked the victim permission to enter her unit to check the Applicant was not inside. She denied Police entry into her unit.

47. Police then heard a commotion from the rear of the victim's unit and heard the words "He's jumped the balcony, he's on the driveway". Police ran to the driveway and saw the Applicant. The Applicant ran onto the street, whereby police gave chase. Police yelled for the Applicant to stop but he continued to run across the road. A Police officer managed to

tackle the accused on the sidewalk, destroying two panels of fence in the process. After a short struggle, the Applicant broke free from the police officer and continued to run down the street. Another police officer gave chase and caught the Applicant.

48. The Applicant was handcuffed and arrested for breaching his Final Order and resisting arrest. When placed into the police vehicle he began kicking the door aggressively and repeatedly. The victim approached the police where they caught the Applicant. When asked why she had lied to the police, she stated, “because I knew there is an AVO between us”.

49. At the time of the offence, the Applicant was serving a 12-month community corrections order which was to conclude on 16 December 2020. He was also to be supervised by Community Corrections Service until the same date.

<u>14 December 2020 conviction</u>

50. On 14 December 2020, the Applicant was convicted in the Fairfield Local Court of New South Wales of two counts of *Contravene prohibition/restriction in AVO (Domestic)* for which he received a s 10A conviction. He was also convicted for the offence of Common assault – T2 for which he was sentenced to a term of imprisonment of 12 months.

Background facts related to the 14 December 2020 conviction

51. The victim, who is the Applicant’s partner, was five months pregnant at the time. Around 27 July 2020, the victim had been staying temporarily with her ex-partner’s mother due to relationship issues with the Applicant. At an unknown date and time, the victim received a video message from the Applicant via Instagram. The video was of the Applicant filming various items that he had damaged inside the victim’s home.

52. On 26 August 2020, the Applicant attended a hotel in Parramatta with the victim. While at the venue, the Applicant lost some money gambling.

53. The Applicant and the victim returned to their vehicle. The Applicant became verbally aggressive towards the victim as a result of the money he had lost. The Applicant slapped the victim and grabbed her and pulled her hair.

54. On 30 August 2020, the victim was staying with her former mother-in-law in Campsie. The victim received a photo from the Applicant via Instagram. The photo was of a car parked out the front of the Campsie residence. The victim knew that the Applicant was outside. The victim received further text messages via Instagram asking the victim to come outside. The text messages, translated from a Farsi dialect into English, were words to the effect of "I am going to do something to you, if you cause problems for me or make any small problems for me I'll make trouble for you".

55. The Applicant was subject to two Intensive Corrections Orders for two separate events at the time of committing these offences and was also subject to an Apprehended Violence Order (AVO).

<u>9 September 2022 conviction</u>

56. On 9 September 2022, the Applicant was convicted in the Fairfield Local Court of New South Wales for the offence of *Stalk/intimidate intend fear physical etc harm (domestic) – T2* for which he received a supervised 12-month community correction order. He was also convicted of three counts of *Common assault (DV) – T2* and *Contravene prohibition/restriction in AVO (Domestic)* for which he was sentenced to a term of imprisonment of nine months. The Applicant pleaded guilty to these charges.

Background facts related to the 9 September 2022 conviction

57. On 6 April 2022, the Applicant approached the victim, his partner, whilst she was in the shower with their daughter. Their daughter fell over whilst in the shower and as a result she hurt herself and began to cry. The Applicant came into the bathroom and when he saw his daughter was crying he became angry and started to verbally abuse the victim. The Applicant kicked the victim in the leg and hand. The victim was 36 weeks pregnant at the time.

58. On 26 May 2022, the Applicant and the victim were preparing to go out. The victim saw the Applicant receive a message from a girl that she had asked him to stop contacting as he was providing her money to assist her with a drug habit. The victim became upset and said she was not going to go out with the Applicant. The Applicant became angry and started yelling and slapping the victim in the face and head. The victim put her hands up to cover

her face and protect herself. The victim turned her back on the Applicant and he pushed her in the back.

59. On 26 June 2022, the Applicant and the victim were at their residential address. The Applicant started an argument with the victim and started yelling at her and calling her derogatory names. When the victim ignored him, the Applicant became angry and used his mobile phone to hit the victim in the face, hitting her right cheekbone. The victim sustained swelling to her cheekbone as a result, but chose not to photograph the injuries she incurred because she feared what the Applicant would do to her. Her feelings were based on past comments the Applicant had made to her like “he will hurt her so badly that she will not be able to walk again”.

60. On 26 August 2022, the Applicant and the victim were at their residential address and the Applicant started asking the victim how many men she has had sex with in the past. The victim became upset and said she has had boyfriends in the past before being with the Applicant. The Applicant started calling the victim a whore and a slut. The victim was scared that the accused was going to hurt her again, so she drove to the Fairfield Police Station with her children and advised the Police of what had been happening. Whilst providing a DVEC to the Police, the victim continued to ask the Police if she had done the right thing and advised the Police she was extremely scared of the Applicant and scared of what he would do to her when he finds out she had gone to the Police.

61. The Applicant was subject to an Apprehended Violence Order at the time of committing these offences.

62. The Applicant is currently subject to an Apprehended Violence Order which remains in effect until 9 September 2024.

CONTENTIONS OF THE PARTIES

63. The Applicant concedes his criminal history in Australia which runs from 2015 until 2022 is very serious. He acknowledges he has engaged in violent offending that includes multiple incidents of family violence and criminality against a woman. He acknowledges he has

committed an offence against a Police officer (resist officer in execution of duty), an offence he concedes is deemed to be serious regardless of the sentence imposed given paragraph 8.1.1(b)(ii) of Direction 99. The Applicant acknowledges he has received numerous sentences including custodial sentences between 2015 and 2022. The Applicant also agrees that his criminality has been frequent and there had been a trend of increasing seriousness. The Applicant accepted that the cumulative effect of his offending was *"unquestionably"* serious and had caused emotional and financial harm to the Australian community. He conceded the cumulative effect of his criminal offending had been *"extensive and wide ranging",* whilst he agreed that any future offending would have the potential to cause emotional, financial and psychological harm to members of the Australian community and could be very serious.

64. The Applicant submitted that he nevertheless was a low risk of reoffending. This was due to his remorse for the totality of his criminal offending; the work he had done whilst incarcerated; his rehabilitation programme that included a counsellor and psychologist; the deterrent effect of future cancellation; his desire to reunite with his family in Australia and return to employment; and his insight into his past offending.

65. The Applicant acknowledged the consideration pertaining to protection of the Australian community weighed against the revocation of the cancellation of his visa, but submitted the adverse weight should be moderated due to his low risk of reoffending.

66. The Applicant conceded the consideration pertaining to family violence also weighed against him. He accepted he had a very frequent history of family violence; there had been a trend of increasing seriousness; it had been to an extent cumulative; and had caused emotional, physical and psychological harm. The weight against him however, he submitted, should be mitigated for the fact he had accepted responsibility; he understood the seriousness of his past behaviour; and had undertaken rehabilitation.

67. The Applicant contended that the strength, nature and duration of his ties to Australia weighed in favour of revocation due to his Australian citizen partner and two Australian citizen children; and the significant hardship it would cause them individually and collectively as a family; as well as his residence in Australia for over a decade. The Applicant also submitted the fact he had been in Australia for over two and a half years before offending and his volunteer work all weighed in favour of revocation.

68. Similarly, the Applicant contended the best interests of minor children in Australia weighed in favour of revocation. As the biological father of children aged two and one, he contends he is developing and maintaining a relationship with them and cares for them deeply. He contents he will play a positive role with his children in the future and provide them with strong emotional, financial and practical assistance. He notes that they are not direct victims of his prior criminal offending. The Applicant contends that any separation he has from his children will cause them hardship (which will also extend to their mother, his partner) and have negative long-term implications.

69. The Applicant also drew the Tribunal's attention to his claimed role with his partner's older daughter IF, whom he regards as a stepdaughter. The Applicant drew the Tribunal's attention to the strong support he has from his partner for his return to the community so he can also provide IF with support.

70. The Applicant conceded that that expectations of the Australian community weighed against the revocation of the mandatory cancellation decision due to his criminal conduct; acts of family violence his offending against women; and his offence against the Police. The Applicant contended this weight however could be mitigated by his individual circumstances including his minor children in Australia; his partner; his residence in Australia; his rehabilitation; and his protection claims pertaining to Australia's international non-refoulment obligations and the legal consequences of an adverse decision. The impediments he would face if removed to Iran were also submitted in mitigation.

71. In relation to other considerations, the Applicant submitted that the legal consequences of a decision weighed in favour of revocation of the cancellation. The Applicant noted that a non-revocation decision would result in prolonged detention until he was either removed from Australia or granted another visa, which was essentially limited to a Protection visa that would likely be refused on character grounds. The Applicant advanced claims that gave rise to Australia's international non-refoulment claims based upon a well-founded fear of persecution for reasons of political opinion and membership of a particular social group; as well as complimentary protection claims based on the real chance of suffering significant harm if returned to Iran. The Applicant submitted a range of relevant country information pertaining to Iran. He submitted that he was at risk of harm if returned to Iran. The Applicant contended that the Tribunal should not defer consideration of his non-refoulment claim

72. The Applicant also submitted that he faced a range of impediments if returning to Iran, particularly relating to his claimed mental health issues in relation to anxiety and depression. Whilst he conceded that he had no language or cultural barriers if he returned, he noted he did not qualify for unemployment benefits in Iran whilst the mental health care available was inadequate.

73. The Applicant's other contention in relation to other considerations pertained to victims. The fact the Applicant's partner, a victim of the Applicant's family violence, provided evidence both written and oral in support of the Applicant with a clear and precise statement that she forgave the Applicant and wanted to reunite as a priority weighed in favour of revocation.

74. Whilst conceding at the Tribunal's hearing the weighing exercise was finely balanced, the Applicant submitted that the adverse primary considerations were outweighed by the countervailing positive considerations, and the cancellation should be subsequently revoked.

75. The Respondent refers to the nature and seriousness of the Applicant's offending and conduct, as well as the risk in the Applicant committing further offences or engages in serious conduct. The committing of multiple violent offences, violence against women, family violence, and the contravention of apprehended violence orders (AVOs) were all relevant to the seriousness of the Applicant's offending. These factors are relevant to the Primary Considerations of the protection of the Australian community, as well as the expectations of the Australian community. The Respondent submits there is a moderate to high risk of the Applicant reoffending in the future based upon the evidence that the Applicant has previously expressed remorse for his offending before going on to again offend. The Respondent has contended that the risk is illustrated by the assessment of the Applicant as being at a medium or significant risk of recidivism at multiple times since 2017, whilst his criminal history demonstrates a disregard for a range of judicial orders including AVOs, Bonds, Community Service Orders, bail and a Community Correction Order. The Respondent submits this consideration should be weighed significantly against revocation of the cancellation.

76. Similarly, the Respondent contends that the family violence consideration should be given significant weight against revocation of the cancellation. The Respondent points out that between 2019 and 2022 the Applicant has been convicted of 6 family violence offences,

demonstrating a concerning frequency and an increase in seriousness that is relevant to Direction 99 8.2(3)(a). The Respondent notes the Applicant was warned in February 2020 by the sentencing judge of the consequences of further acts of violence to no avail.

77. The Respondent concedes the strength nature and duration of the Applicant's ties to Australia weighs in favour of revocation, particularly through the Applicant's immediate family of his partner (whom the Applicant notes there is evidence about her mental health) and two biological children. The Respondent contends the weight in the Applicant's favour should be mitigated somewhat by the fact the Applicant's formative years were not spent in Australia whilst his first offending (as opposed to conviction) was just under two years after his arrival in Australia.

78. In relation to the best interests of the child consideration, the Respondent submits the weight in the Applicant's favour is again mitigated by the Applicant's long period of physical absence (whilst in gaol and immigration detention) from his children as well as the evidence that the Applicant exposed his child to family violence (noting Direction 99 8.4(4)(g)). The respondent contends there is a risk that the Applicant may expose his children to family violence which reduces the weight the Tribunal should give in favour of the Applicant with this consideration. In relation to the expectations of the Australian community consideration, it is contended that this should be given significant weight against revocation due to the nature of the Applicant's offending.

79. In relation to the legal consequences of the decision, the Respondent notes that the Applicant is not covered by a protection finding. He has however made multiple claims that he will be persecuted, tortured and executed by the authorities should he return to Iran due to his previous involvement in civil disobedience, as well as the finding by the UN High Commissioner for Refugees (UNHCR) in Turkey that he was a political refugee. The Respondent concedes that these claims are broadly consistent with those the Applicant made to the UNHCR in his application for an offshore humanitarian visa, and that the Applicant's claims appear credible. The Respondent conceded that the claims were "likely" to give rise to international non-refoulment obligations. The Respondent however has submitted that, contrary to the Applicant's contention, the Tribunal ought to defer

assessment of the non-refoulment claims –as it may do[3]: – given that it remains open to the Applicant to apply for a Protection visa. The Respondent also raised a credibility concern pertaining to the Applicant's potential protection claims. The Respondent contended that if the Tribunal was ultimately minded to consider non-refoulment obligations, these should be given little weight as it remained open to the Applicant to lodge a protection visa application where his claims would be fully assessed.

80. The Respondent has conceded that there are some impediments to the Applicant if he is removed. The Respondent accepted that the Applicant may be at risk of harm in Iran, as he has claimed, because of both the security situation there and his various claims concerning the Iranian government. The Respondent also accepts the Applicant has mental health issues and has been receiving treatment – but notes the Applicant will have access to treatment that is equivalent to other Iranian nationals. The Respondent concedes country information presented by the Applicant that he will not be granted unemployment benefits if he returns to Iran as an impediment. The Respondent does submit however that the Applicant will not face any substantial cultural or language barriers if he were returned to Iran – claims that are accepted by the Applicant. Ultimately, the Respondent concedes that the impediments to return the Applicant to Iran are in favour of the revocation of the cancellation decision.

81. The Applicant at the Tribunal's hearing expressed firm statements that only his dead body would ever return to Iran. The Respondent submits that the Tribunal should find the Applicant will not be returned to Iran if his visa is cancelled due to the fact Iran does not accept involuntary returns from Australia where the person at issue arrived before 19 March 2018.

82. The Respondent accepts that if the Applicant's visa is cancelled, the Applicant faces the prospect of indefinite detention given he cannot be removed to Iran on an involuntary basis. The Respondent furthermore concedes that even if the Applicant satisfies the criteria for the grant of a Protection visa, his visa could still be refused on character grounds, and the Applicant would potentially remain in detention indefinitely. The Respondent accepted that

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[3] *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 ('*Plaintiff M1-2021*').

the potentiality of indefinite detention *"should be given meaningful weight in favour of revocation"* of the mandatory cancellation.

83. In relation to the impact on victims, the Respondent accepts the Applicant's partner (the victim of his domestic violence offending) has forgiven the Applicant and does not fear him. The Respondent concedes this is relevant under this consideration. The Respondent however submits that this consideration should not be given any significant weight in favour of the Respondent in a matter such as the present, noting the sentencing judge found that the Applicant's partner might not have any fears, but it did not resolve his concerns that if released on bail he might further assault her or family members.[4]

84. The Respondent has also addressed the issue of the Applicant's partner and her status as a victim of the Applicant's offending. The Respondent notes that the Applicant has essentially submitted that, as the Applicant's partner is a victim of the Applicant's offending and has forgiven him and wants him to remain with her in Australia, this consideration consequently weighs in favour of revocation. The Respondent disagrees, instead submitting that the impact of the cancellation of the Applicant's visa on his partner, and his partner's desire for him to remain in Australia with her, is a matter to be considered under the strength, nature and duration of ties to Australia to consideration rather than essentially "double counted" as weighing in favour of the Applicant in relation to the impact on victims consideration.

85. Finally, the Respondent contended that the impact on Australian business interests consideration was not relevant as the Applicant's employment would not significantly compromise the delivery of a major project, or delivery of an important service in Australia: Direction 99 9.4(1). This was not contested by the Applicant.

86. In summary, the Respondent contends that the factors weighing against revocation of the cancellation of the Applicant's visa outweigh the factors in favour of revocation.

87. The critical issues in dispute between the parties are how the Tribunal should assess the primary considerations of the protection of the Australian community; family violence; the

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[4] G3B, 54.

strength, nature and duration of ties to Australia; the best interests of minor children in Australia affected by the decision; and the expectations of the Australian community; along with other considerations, most principally the legal consequences of the decision with the issue of prolonged detention in the particular circumstances of the applicant's case.

88. The Tribunal's considerations are set out below with regard to the Direction.

IS THERE ANOTHER REASON TO REVOKE – CONSIDERATION OF DIRECTON 99

Primary Consideration 1 – Protection Of The Australian Community

89. In considering Primary Consideration 1, paragraph 8.1 of the Direction requires decision-makers to keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity, or other serious conduct, by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens. However, this privilege is conferred in the expectation that non-citizens are, and have been, law abiding, that they will respect important institutions, and that they will not cause or threaten harm to individuals or the Australian community.

90. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to consider:

> *a) The nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

The Nature and Seriousness of the Applicant's Conduct to Date

91. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors. Not all of the factors specified are relevant to the facts of this case: the Tribunal has focused on those matters that are most pertinent.

92. Subparagraph (a) of paragraph 8.1.1(1) of the Direction provides that, without limiting the range of conduct that may be considered very serious, violent and/or sexual crimes; crimes

of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence, or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community. Subparagraph (b) identifies conduct that may be considered serious, much of which is not relevant to the conduct of the Applicant, although there is a catch-all provision referring to any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent on the decision-maker's opinion. Subparagraph (c) directs a decision-maker to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen/Applicant and sub-paragraph (d) points a decision-maker to the frequency of a non-citizen's offending and whether there is any trend of increasing seriousness. Subparagraph (e) is concerned with an examination of the cumulative effect of an Applicant's repeated offending. Subparagraph (h) is not relevant to the present case because there is no suggestion that the Applicant provided false or misleading information to the Department or that he failed to disclose prior criminal offending. Subparagraph (g) focuses on whether the non-citizen has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status.

93. The Tribunal has considered the nature and seriousness of his conduct.

94. Guided by paragraphs 8.1.1(1)(a)(i) to (iii) of the Direction, the Tribunal finds that the Applicant's behaviour is to be viewed very seriously. His conduct has involved violent conduct (i); it has involved crimes of a violent nature against women (ii); and it has involved acts of family violence (iii).

95. The Applicant has been convicted of multiple offences over a seven year period as set out previously in this decision record. These offences, that commenced in 2014 with motoring offences and anti-social behaviour on public transport, rapidly escalated to crimes of violence by October 2014. Crimes of family violence and violence against women followed. His offending has become objectively more serious over a period of time, leading ultimately to his incarceration. The Applicant's violent behaviour, as summarised by the Tribunal earlier in this decision record, has included seven counts of Common assault and one count of Armed w/l commit indictable offence – T1. Of the seven counts of Common assault, five occurred between 2019 and 2022 and constitute acts of Family Violence where the Applicant's partner was the victim. One occurred in the presence of the Applicant and his partner's young child.

96. The Tribunal notes that the cancellation of the Applicant's visa is grounded in his conviction of 14 December 2020 for *Common assault – T2*. The conviction relates to events of 26 August 2020 where the Applicant became verbally aggressive towards his pregnant partner which then led to him slapping, grabbing and pulling her hair. The Applicant was sentenced to a term of imprisonment of 12 months, a sentence that constitutes a substantial criminal record under s 501 (7)(c). As the Applicant had a substantial criminal record he did not pass the character test under s 501(6)(a). Based upon this conviction his visa was cancelled under s 501(3A).

97. The Applicant however has been convicted of various offences involving family violence, both prior to and since this offending. The Applicant has been convicted of multiple acts of family violence during this period, in particular in 2022 where in April, May and June the Applicant was convicted of separate Common assault (DV) – T2 charges. In August that year the Applicant was also convicted of stalk/intimidate intend fear physical etc harm (domestic) – T2 in relation to his partner the Tribunal notes that Direction 99 states that acts of family violence are considered 'very serious' by both the Australian Government and the Australian community.

98. The Applicant's offending can also be considered 'serious' as guided by paragraph 8.1.1(1)(b)(ii) given the Applicant's conduct includes crimes against vulnerable members of the community (being his pregnant partner) and government representatives or officials in the performance of their duties (being the Applicant's conviction on 12 February 2020 for resisting a Police officer in the execution of duty). The Tribunal furthermore notes the Applicant's partner was a protected person under an AVO at the time of some of the Applicant's offending against her, a status also pertinent to his partner's classification by the Tribunal as a vulnerable member of the community.

99. The Applicant has also demonstrated a wider disregard for the law due to his apparent contempt for his bail conditions (he failed to report to Parramatta Police Station as required by bail conditions on 15 occasions between 2014 and 2015). The Applicant in 2019 contravened an AVO in place which prevented him from going within 200m of his partner, subsequently being convicted for the offence of Resist officer in execution of duty – T2 when he tried to escape from Police that attended his partner's property. He contravened AVOs again in relation to his partner on multiple occasions between 2020 and 2022.

100. This contempt for the law has been further demonstrated by depressingly regular traffic and road infringements.

101. The Respondent submits that the Applicant's criminal history should be viewed very seriously. The Respondent notes that the Applicant has been convicted of various violent offences, including violence against women and family violence. The Respondent notes that the sentence of imprisonment imposed by the Court is indicative of the seriousness of the Applicant's offending. The Tribunal notes subparagraph (c) of paragraph 8.1.1(1) of the Direction, which requires a decision-maker consider the imposition of a custodial term in any reasonably and correctly applied sentencing process. The Tribunal finds that the Applicant's criminal conduct is objectively serious. The Tribunal accepts the Respondent's submission that the Applicant has demonstrated a concerning disregard for the law, with multiple violent offences, including domestic violence and violence against women, along with multiple contraventions of AVOs and a general contempt for the law.

102. The Applicant has conceded his criminal history is very serious, and that he has engaged in violent offending, criminality against a woman and multiple instances of family violence. He concedes he has committed an offence against a Police officer (paragraph 8.1.1(b)(i)). The Applicant agrees that it can be concluded his criminality has been frequent with a trend of increasing seriousness. He accepts his criminal behaviour has caused emotional harm and financial harm to the community, as well as utilising enforcement and judicial resources. The Tribunal notes the Applicant pleaded guilty to a multitude of offences for which he was charged.

103. The Tribunal finds that the Applicant's history of criminal offending is very serious. The applicant's claims that he was not fully responsible for at least some of his behaviour does not diminish the objective seriousness of his offending. It has been over a lengthy period and some of the Applicant's conduct has been violent, causing physical and possibly psychological harm. The Applicant accepts the Respondent's submission that the nature and seriousness of the Applicant's offending weighs against revocation of the cancellation of his visa.

104. It is well-established that imposition of a custodial term upon an offender is seen as the last resort in the sentencing hierarchy. A judicial sentencing officer's deployment of a custodial sentencing option must be viewed as a reflection of the objective seriousness of the

offending sought to be punished.[5] The Tribunal acknowledges subparagraph 8.1.1(1)(c) and notes the imposition of a custodial sentence is indicative of the objective seriousness of an Applicant's offending.

105. Relevant to paragraph 8.1.1(1)(d) and (e) of the Direction, the evidence before the Tribunal is that the Applicant has offended frequently between 2014 (less than two years after his arrival in Australia) and 2022. Between the period 2015 and 2022 the Applicant was convicted of seven Common assault counts; one count of Armed w/l commit indictable offence – T1; one count of Resist officer in execution of duty – T2; 4 convictions for Contravening an AVO; two driving offences; as well as infringement notices for a further 18 driving offences. The increasing frequency of his offending is also characterised by its increasing seriousness, including multiple Common assault convictions in 2022. The frequency of the Applicant's offending adds to the seriousness of his behaviour. The Applicant's recidivism is a significant concern to the Tribunal. The Applicant has repeatedly committed the same offences, including contravening AVOs put in place to protect victims. The Tribunal has considered the cumulative effect of the Applicant's repeated offending**.**

106. Guided by paragraph 8.1.1(1)(g) of the Direction, the Tribunal notes that the Applicant has reoffended on multiple occasions, including convictions for Common assault and breaching AVOs, since 24 June 2020 when the Department of Home Affairs formally warned, or otherwise put the Applicant on notice, in writing, about the consequences of further offending in terms of his migration status.[6]. The fact the Applicant committed very serious offences following him being warned about the consequences of further offending in terms of his migration status is a further indication of the seriousness of the Applicant's behaviour.

107. The Tribunal accepts that the Applicant has not provided false or misleading information to the Department (paragraph 8.1.1 (f)), nor has he engaged in criminal offending or other adverse conduct outside Australia (paragraph 8.1.1(h)).

108. The Tribunal has sought to apply each of the relevant subparagraphs in paragraph 8.1.1(1) of the Direction. On the basis of the evidence before it, and for the stated reasons, the

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[5] *PNLB and Minister for Immigration and Border Protection (Migration)* [2018] AATA 162, [20]-[22] (SM Poljak).

[6] G3S, 280

Tribunal finds the Applicant's criminal offending to be *very serious* in nature and this weighs against the exercise of the discretion to revoke the mandatory visa cancellation decision.

Risk to the Australian community should the Applicant commit further offences or engage in serious conduct

109. Paragraph 8.1.2(1) provides that in considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

110. Paragraph 8.1.2(2) provides that in assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

> *a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;*
>
> *b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> > *(i) information and evidence on the risk of the non-citizen re-offending; and*
> >
> > *(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence.*
>
> *c) where consideration is being given to whether to refuse to grant a visa to the non-citizen - whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.*

111. The Tribunal's task is to assess the nature of the harm to individuals or the Australian community in the event of this applicant engaging in further criminal or other serious

conduct. To make such an assessment requires the Tribunal to consider what harm would be caused to individuals or the Australian community if the Applicant were to reoffend and return to criminal conduct. The Tribunal has subsequently considered what harm would be caused if the Applicant returned to offending via the resumption of criminal behaviour that includes *common assault, contravene prohibition/restriction in AVO (domestic), stalk/intimidate intend fear physical etc harm (domestic), armed w/l commit indictable offence, destroy or damage property <=$2000, resist officer in execution of duty, fail to appear in accordance with bail acknowledgement, possess/attempt to, prescribed restricted substance, drive motor vehicle while licence suspended – 1st offence and 2nd offence.*

112. The Tribunal has considered the nature of any harm, should the Applicant reoffend in accordance with paragraph 8.1.2(2)(a) and engage in further criminal or other serious conduct. The Tribunal, having noted the Applicant's offending to be very serious, considers that the nature of any harm, should he again engage in further criminal or other serious conduct of a similar nature, would be significant. The Tribunal considers there would be serious harm to both individuals and the community. The Tribunal particularly considers the violence and family violence offences are serious and could cause serious emotional and/or physical damage to the victims should the Applicant reoffend. His behaviour could cause serious physical, psychological and emotional harm to members of the Australian community, especially women. Any future serious criminal conduct of the Applicant, of a similar nature, can be expected to have a detrimental impact upon the victims. For these reasons, the Tribunal finds that the nature of the harm to individuals should the Applicant engage in similar criminal offences, particularly family violence offending, is very serious.

113. The Tribunal notes that the Applicant has not disagreed with the thrust of these findings, with the Applicant agreeing that if he were to commit further criminal offences, there would be the potential to cause emotional, financial and psychological hardship to members of the Australian community, and any such behaviour could "undoubtedly" be very serious.

114. The Tribunal has considered the likelihood of the Applicant engaging in further criminal or other serious conduct. It has taken into account information and evidence of the risk of the Applicant re-offending; and any evidence of rehabilitation achieved by the time of decision, giving weight to time spent in the community since their most recent offending.

115. The Applicant asserts that he is of "a very low risk" of reoffending. He states he is "extremely remorseful" for his offending. He states that the combination of three months in gaol and now nine months in immigration detention have had a profound effect on him, and the incarceration and separation from his partner and children has led him to have an epiphany about his life, the need to be a responsible citizen, and the need to leave his past offending behind him for good. The fear of seeing his visa cancelled and losing access to his children and partner have, he claims, acted as a significant deterrent to further offending and provided him with insight into his past offending. He further claims that working in gaol has also had a positive impact upon his outlook.

116. The Applicant also discussed the rehabilitation he has undertaken whilst in gaol and immigration detention. The Tribunal notes the Applicant has completed domestic violence programmes whilst he has also engaged in a positive parenting program, child safety for parents, healthy relationships, positive parenting techniques, stress management and life coaching. The Tribunal notes the copies of various certificates of completion that have been submitted to it.

117. The Applicant also has been the regular patient of a counsellor and a psychologist whilst in immigration detention, whilst he has also sought the support of a psychiatrist. This medical support has been invaluable, the Applicant claims, to his rehabilitation:

DR DONNELLY: Now in your statement at paragraph 19 you say that you've seen a psychologist and a counsellor during your time in immigration detention?

APPLICANT: Yes.

DR DONNELLY: Could you please tell the tribunal your experience with these mental health professionals?

APPLICANT: I just attended this mental professionals (indistinct) the first week I arrived in detention centre because I wanted to take steps to be better. When I saw the psychologist for the first time I talked to this person and told him or her things that I had never said that to anyone else and I felt light and comfortable after I told my psychologist those things. I cried a lot and I told to my psychologist everything. In return he or she was also talking to

me very nicely and beautiful. He or she really diagnosed or understood my problem. By that I mean that he or she really understood and find out what my problem was. And I can say that I was in the best possible state of mental situation during the nine months I was visiting my psychologist. I mean that I never had such a feeling, such a good feeling before.

DR DONNELLY: Are you able to estimate how many times you've seen the psychologist counsellor in detention?

APPLICANT: Counsellor and psychologist together maybe more than 20 or 30 times. The psychologist was giving me appointments every three weeks, but the counsellor was seeing me every seven to 10 days.

DR DONNELLY: So psychologist every three weeks and counsellor every, sorry was it seven days?

APPLICANT: Every seven to 10 days.

118. The Applicant claims he will continue this rehabilitation in the community should the cancellation of his visa be revoked.

119. The Respondent contends that there is a moderate to high risk that the Applicant will reoffend in the future. The Respondent noted the Applicant's risk of reoffending had been assessed by the relevant authorities between 2017 and 2022 and has variously been considered "medium" "significant" and most recently after his repeated 2022 reoffending as "T3/Medium-High".

120. The Respondent also noted the Applicant's delinquent history of ignoring judicial orders and law enforcement mechanisms. As discussed elsewhere in this decision record, the Applicant has between 2014 and 2022 breached multiple AVOs and bail orders. He was gaoled for three months in 2020 before being released on parole: to offend again. He has also breached Community Service Orders, a Community Correction Order, and a bond. This disregard for accepting judicial orders and law enforcement mechanisms, combined with a record of repeat serious criminal offending, led the Respondent to submit that, based on such evidence, there a strong basis for the Tribunal to conclude that the applicant will reoffend in a similar way in the future, and there is a real risk he will again engage in such behaviour.

121. The Applicant at the Tribunal's hearing spoke at some length about his claimed rehabilitation, and the factors motivating his changed outlook on life at the Tribunal's hearing. The Applicant acknowledged that he had previously stated in 2020 to a sentencing judge that he had learned his life lessons after being convicted, and he would not offend again, prior to recommencing his anti-social and criminal behaviour.

122. The Respondent submits that whilst the Applicant has expressed remorse and undertaken rehabilitation courses, the Tribunal 'should be slow to accept' the Applicant's contrition, particularly in circumstances where he had expressed remorse for his domestic violence offending but gone on to repeatedly reoffend.

123. The Tribunal has considered the evidence before it. The Tribunal notes that the Applicant's past behaviour in its own right strongly suggests there is a likelihood of his reoffending in the future. The Applicant's recidivism and regular disregard for serious judicial orders, such as AVOs, suggests he is at risk of repeating similar offending in the future.

124. A question before the Tribunal is what has motivated the Applicant's past offending, and what rehabilitation and treatment have been undertaken effectively to mitigate any future risk.

125. The Tribunal accepts the Applicant's evidence that he has undergone significant treatment for his mental health whilst in immigration detention through counselling and seeking the assistance of a psychologist. There would appear to be little doubt that the Applicant's mental health has been a significant challenge for the Applicant and has impacted at least in some way upon his past poor behaviour and his offending. Noting the Applicant's claims concerning his experiences in Iran, claims the Tribunal accepts are credible, the Tribunal considers that the Applicant's past adverse experiences in Iran have played a role in his mental health and his subsequent anti-social, delinquent and sometimes criminal behaviour. The Tribunal has noted the statements of his partner that the Applicant has suffered from depression and needs assistance in relation to his past trauma. The psychologist's report of Dr Massoud Amani of 7 December 2020 discusses the Applicant's mental health afflictions including adjustment, anxiety, severe depression, PTSD and panic attacks.

126. The Applicant would appear to have been open and willing to undertake such treatment since entering immigration detention and at times prior to this. The Tribunal accepts that this treatment whilst in immigration detention would appear to have had a positive impact upon the Applicant's psychological health, his relationship with his partner and family, and his general outlook on life. This was corroborated by the testimony of the Applicant's partner, the victim of much of his offending, who has asserted that the Applicant's time in detention as well as his ongoing treatment has all had a profound change on the Applicant. She stated:

PARTNER: And for this past one year, he has changed a lot, and he's being a very loving person towards me, and his kids….. So when he was in prison – detention centre, we started doing FaceTime, and then he had been like a different – totally different person, since even he's been taking his courses, and he's been like different, like he's been a father, he's been a partner, (indistinct), I know him, I know when he is changed, I've known him for six years, I can tell when he's changed. I just want him home for his kids and for me.

127. The Tribunal notes the Applicant stated in his testimony at the hearing, which was also submitted in his written statement, that he wished to continue with his psychological treatment and care in the Australian community through a mental health treatment care plan. The Tribunal would note that those psychological services may be accessed essentially free of charge through a GP on Medicare. The Tribunal would consider such treatment simply vital in mitigating the risk of the Applicant reoffending

128. The Tribunal would also accept the proposition that the separation of the Applicant from his partner and children for a year — three months in gaol, nine months currently in immigration detention — has had a deterrent effect upon the Applicant and has potentially mitigated the risk of reoffending. Immigration detention is of course not 'punishment' as such, though the Tribunal accepts for the Applicant the loss of his liberty leads him to a similar conclusion. The Tribunal notes the Applicant has previously contended (such as in 2020) he had learned from his past offending only to reoffend. Since that period however the Applicant now has actually experienced the limitations and restrictions of both gaol and ongoing immigration detention. He has experienced the ongoing physical separation from his partner and young children The Applicant stated this experience, along with his ongoing mental health treatment, had changed him:

APPLICANT: I would like to say that I would like you to believe me that I will never commit the same mistakes again in my life because this time I really learned the biggest lesson of my life. I was away from my children. I had a very hard time. Well, I was away from my family. I am in a bad situation in detention centre. I have not taken food. I am not doing anything and I have had - I am in bad circumstances. And all my wrongdoings of the past have caused this consequence for me. So I will not repeat it, which will result me to be re-transferred back to the detention centre. And now I would like to have my life.

Because this time really, I suffered from pain because this time really that I would like to change from all my body. All really this time I was punished badly. Because really, I realised this time that nothing is better than family, wife and your children and there is no better way than the correct way. I remember that I read somewhere in the past to the extent that if you accept all your mistakes of the past and also accept the (indistinct) of those mistakes it is as if you'll just hug a cactus. For the time being I am the person who has accepted past mistakes and as I go forward my life will be in line and I will become a better person. For this nine months I have been in the detention centre I swear that every day has counted as a month for me. I am really in a very hard condition and I don't wish to make any mistake ever. So again I'm back to this situation.

129. The Tribunal has also taken into account the Applicant now appears to have a firm realisation of the prospect of future visa cancellation should he again reoffend. He has experienced incarceration and immigration where he states he suffered significantly. The Tribunal accepts the contention that this experience has possibly been a 'wakeup call' to the Applicant. The Tribunal notes that the Applicant has clearly submitted that he appreciates that if his visa was unrevoked, and he returned to any reoffending, that any future criminality could lead him back into criminal incarceration, immigration detention, separation from his partner and family, and potentially the cancellation of his visa. The Tribunal considers this is a powerful deterrent factor to future reoffending.

130. The Tribunal accepts the testimony of the Applicant's partner that the Applicant's remorse is genuine, and she accepts he has changed for the better. The Tribunal, whilst understandably harbouring some doubts itself as to the Applicant's ability (and potentially willingness) to commit to a long-time, law-abiding and constructive life, is prepared to give some weight to his claim that he is a vastly improved man from the previous offender. The Tribunal accepts the Applicant's ongoing mental health treatment through a psychologist

and counsellor has been to his benefit and has helped address his issues and mitigate some of the risk he poses. His regular anti-depressant prescription medication also would appear to be having a positive impact on the Applicant. The Tribunal accepts that the Applicant's experience with gaol and immigration detention, and the separation it has caused him, is acting as a genuine deterrent to future offending. The Tribunal has also taken into account the Applicant's courses he has completed as part of his rehabilitation from the perspective of the risk of future reoffending. The Applicant has successfully completed courses in Domestic Violence 101, Stress Management, Positive Parenting Techniques, Healthy Relationships, and Anger Management 101. In summary, the Tribunal accepts that the Applicant has at least mitigated the risk of his reoffending in the future.

131. The Tribunal notes, nevertheless, that there remains significant evidence before it that suggests the Applicant remains a significant risk of reoffending, despite his claims and the evidence discussed above outlining his rehabilitation. The assessments undertaken by the authorities in relation to risk remain of concern. The Tribunal would particularly note the Applicant's Community Impact Assessment rating of 2022 that rated the Applicant a T3/Medium-High risk of reoffending. The Tribunal furthermore notes, as pointed out by the Respondent, that in February 2020, the Applicant had completed a rehabilitation course at the EQUIPS Domestic Abuse Program which did not prevent him from further offending. He also spent three months incarcerated in 2020 only to offend again.

132. The Respondent summarised the risk, based upon his past offending behaviour:

MS LEWIS: The respondent contends that the applicant has a disregard for the law, this is demonstrated in the following facts that the applicant breached bail on 16 occasions. The applicant has been convicted of breaching apprehended violence orders on four occasions, he's breached the following judicial sentences, community service orders, bonds and a community correction order. The applicant has also been convicted for two driving offences, received traffic infringement notices for 18 driving offences, and received three transport infringement notices.

Finally, the applicant's behaviour as a whole disclosed a pattern of behaviour. The applicant's offending was not a one-off occurrence, nor was it out of character. For these reasons, the respondent contends that this consideration should be given significant weight against revocation.

133. The Tribunal appreciates there remains a risk of reoffending by the Applicant. The Applicant's past record is poor. He has demonstrated a propensity to offend and a contempt for our laws. The Tribunal ultimately however is prepared to accept that, based upon the applicant engaging in considerable rehabilitation in immigration detention including online courses as well as consulting mental health professionals in detention on a very regular occasion for almost the nine months, the risk as highlighted by the authorities most recently in 2022 has been reduced. The Tribunal accepts the Applicant's detention, and fear of further detention and incarceration, has also had a deterrent effect upon the Applicant; the Tribunal has placed weight on the evidence of his partner in this regard. The Tribunal has furthermore placed weight on his partner's evidence that the Applicant has changed significantly since being gaoled and today, due to all of the events and supports summarised above, is attempting to change his ways. The Tribunal has placed a significant amount of weight on evidence of the Applicant's partner and her steadfast support for the Applicant and his changed character, despite her being the victim of the Applicant's criminality.

134. The Tribunal does not accept there is no risk. It in fact considers at least a moderate to medium risk of reoffending, simply based upon his pattern of past poor behaviour remains. The Tribunal notes the Applicant has for instance engaged in poor behaviour in immigration detention through attempting to secure some contraband vapes whilst the Tribunal notes the evidence that whilst incarcerated he swore at a prison officer.

135. The Tribunal ultimately concludes that a risk of reoffending remains. The Applicant's past pattern of behaviour can lead to no other plausible conclusion. The Tribunal accepts the Applicant has undertaken rehabilitation over the past nine months through very regular counselling, treatment from his psychologist, and by undertaking a range of courses to assist him in the future. The Tribunal accepts this has had a positive impact upon the Applicant. The Tribunal furthermore accepts the combination of three months in gaol and now nine months in immigration detention — and the loss of liberty this has entailed — has had a deterrence effect on potential future reoffending. The oral testimony and evidence of the Applicant's partner, and her insights into the Applicant, have been taken into account by the Tribunal in its assessment of risk. The Tribunal has also taken into account his repeated statements of remorse for his past delinquent and criminal behaviour. The Tribunal does accept the Applicant wishes to be in the community to be with, and support, his children.

136. On the basis of the evidence before it, and taking into account all available information and evidence of the Applicant reoffending and his rehabilitation, the Tribunal finds that the likelihood of the Applicant engaging in further criminal or other serious conduct is moderate to medium. In the context of the potential harm to the Applicant's victims should he engage in the same or similar conduct in the future, the Tribunal finds this risk to be unacceptable.

137. The Tribunal therefore finds that the risk of reoffending remains. The Tribunal finds that were the Applicant to commit further offences or engage in serious conduct, the nature of the harm to individuals and/or the Australian community would be very serious.

138. With reference to the weight attributable to this Primary Consideration 1, the Tribunal finds the nature and seriousness of the Applicant's conduct has been 'very serious'. The Tribunal finds that were the Applicant to reoffend, the nature of the harm to individuals and/or the Australian community would be 'very serious;' and, in terms of recidivist risk, the Tribunal has, after a fulsome review of the evidence, concluded that the Applicant remains a risk of reoffending.

139. The Tribunal has formed the view that the Primary Consideration 1, protection of the Australian community, weighs heavily against the revocation of the cancellation of the Applicant's visa in the circumstances of this case.

Primary Consideration 2: Family Violence

140. Paragraph 8.2 (1) of the Direction provides that "The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia." It is furthermore noted that the Government's concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen and thereafter the Direction sets out, at subparagraph (3), certain factors that should be considered.

141. The Direction defines family violence as "*violent, threatening or other behaviour by a person that…causes the family member to be fearful*."

142. The Direction, furthermore, states that a member of the person's family, for the purposes of the definition of family violence, includes a person who has, or has had, an intimate personal relationship with the relevant person. In the current case, the Applicant's offending involved six family violence incidents between 2019 and 2022. These consisted of five convictions for *Common assault – T2* and one conviction of *stalk/intimidate intend fear physical etc harm (domestic) – T2*. The victim in each offending was the Applicant's de facto partner, who remains the Applicant's de facto partner today.

143. The Applicant does not dispute the Respondent's contention that the Applicant's partner is a family member of the Applicant's family for the purposes of the definition of family violence, as she was in an intimate relationship with the Applicant at the time of the offending.[7]

144. The Applicant and his partner commenced their relationship in May 2019. The incidents of family violence are summarised earlier in this decision record. The first incidence of family violence was in December 2019 at The Star Sydney. The second was in August 2020 at the Rose Grand Hotel Parramatta. The third, fourth and fifth occurred in consecutive months (April, May and June 2022) at the parties' residential address and demonstrate a concerning increase in seriousness. Each of those incidents resulted in convictions for *Common assault – T2.* In August 2022, the Applicant's partner was in fear of his objectionable and offensive behaviour after he returned home from work, and she feared the Applicant would hurt her again. Such was her fear of harm at the hands of the Applicant, that it necessitated taking herself and their children to Fairfield Police Station. The Applicant was subsequently convicted of *stalk/intimidate intend fear physical etc harm (domestic) – T2.*

145. The Applicant accepts that this primary consideration weighs against him, but he has contended that he does not have a "very frequent history" of family violence. The Tribunal considers the offending is at least frequent, particularly in 2022. The Applicant has accepted, as the Tribunal has found, that there is a concerning trend of increasing seriousness in relation to his acts of family violence. The Applicant has also conceded that the cumulative effect of his offending is troubling, and this has caused emotional, physical and psychological harm.

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[7] Direction 99, [4(1)].

146. The Applicant has also correctly conceded that paragraph 8.2(3)(d) of the Direction weighs against him, noting that he did engage in further acts of family violence after being warned and made aware of the adverse consequences of any further acts of family violence.

147. In mitigation, the Applicant in his oral testimony at the hearing and in his statement stated he accepted full responsibility for the impugned family violence conduct he had committed. He discussed his rehabilitation programmes, the mental health treatment he had undertaken, and the realisation of the damage his past appalling behaviour had caused to his partner, and through her, to their children.

148. The Tribunal subsequently finds that the Applicant has been convicted of six family violence offences. The Tribunal furthermore finds the offending was serious, involving physical assault, stalking and intimidation.

149. In considering the seriousness of the family violence engaged in by the Applicant, the Tribunal has had regard to the factors set out in paragraph 8.2(3) of the Direction. There is a trend of the conduct representing family violence as occurring more frequently in 2022 and of increasing seriousness. The Tribunal has had regard to the cumulative effect of such acts.

150. The Tribunal notes that the Applicant's offending did involve an increase of offending over time, notwithstanding his first family violence offence was a physical assault. The circumstances of family violence have been set out in this decision, and suggest the Applicant has used physical violence and threatened violence towards another person. The Tribunal is of the view these six particular offences constitute family violence. The cumulative effects of the Applicant's behaviour that is classified as family violence leads the Tribunal to conclude that he has a significant propensity to commit such acts that constitute family violence towards his partner. The Tribunal is particularly concerned as to the incident of April 2022 where the Applicant assaulted his heavily pregnant partner with a kick to the leg and her hand in front of their very young daughter. Whilst no injuries were sustained, the committing of such an act towards a heavily vulnerable pregnant woman in front of their child is deplorable. The Applicant's propensity to ignore AVOs in place to protect his partner is of further obvious concern.

151. The Tribunal is acutely aware of the Government's (and the community's) firmly expressed concerns through Direction 99 as to the seriousness of family violence.

152. The Tribunal has taken into account the evidence of the Applicant's partner, who is the victim of the family violence offending. She stated repeatedly that she had forgiven the Applicant for his offending, that she did not fear him, and that the last year whilst he had undergone rehabilitation had had a significantly positive effect on his behaviour:

PARTNER: . And for this past one year, he has changed a lot, and he's being a very loving person towards me, and his kids. Without him like, I can't live without him (audio malfunction).

..

DR DONNELLY: You said that you forgive him, only answer this, of course, if you can, is there a point in time where you came to the realisation that you forgive him for his bad conduct towards you?

PARTNER: Well since he's been to detention centre, he's been like, (indistinct words) because he's in prison, he couldn't come to (indistinct). So when he was in prison – detention centre, we started doing FaceTime, and then he had been like a different – totally different person, since even he's been taking his courses, and he's been like different, like he's been a father, he's been a partner, (indistinct), I know him, I know when he is changed, I've known him for six years, I can tell when he's changed. I just want him home for his kids and for me.

153. The Tribunal has also taken into account the Applicant partner's actions in applying to amend the AVO (currently in place until September 2024) to firstly allow contact with the Applicant in immigration detention. The Applicant's partner at the Tribunal's hearing stated that she would immediately move to withdraw the AVO so the Applicant could return home to herself and their children as a priority.

154. The Tribunal has taken into account the attempts at rehabilitation by the Applicant. The evidence suggests the Applicant has made some ongoing attempts to address his mental health challenges through regular counselling and visits to his psychologist. The Tribunal notes the Applicant has acknowledged his offending and expressed strong remorse for his offending. As has been discussed by the Tribunal previously, the Tribunal nevertheless

notes the Applicant's past pattern of behaviour, notes his recidivism, and retains ongoing concerns as to the Applicant's commitment to genuine and long-lasting rehabilitation. The cumulative effect of his offending and the increasing seriousness of his offending in 2022 have all been taken into account by the Tribunal.

155. The Tribunal has considered the Applicant's reoffending since being formally warned about the consequences of further offending that constitutes family violence. The Applicant's first act that constitutes family violence was in 2019. Despite a conviction at that time for common assault, he was afforded a Community Correction Order and a fine. Multiple AVOs put in place to protect the Applicant's partner were subsequently breached, and as noted the Applicant reoffended again repeatedly after being warned by Magistrate Tsavdaridis in the Fairfield Local Court on 12 February 2020 about the consequences of further acts of proved misbehaviour that includes family violence. The Tribunal considers the evidence suggests the Applicant has had multiple warnings about the consequences of further offending that constitutes family violence.

156. The Tribunal finds that some of the Applicant's offending involved family violence. The Tribunal is satisfied the Applicant's partner, the victim of his offending, has forgiven him for his behaviour. The Tribunal acknowledges the Applicant's actions in support of his own rehabilitation, his stated remorse and his statements he wishes to move on with his life and be a responsible father working for the benefit of his partner and their children. The Tribunal nevertheless acknowledges the seriousness of his past disgraceful behaviour, the concerns the Tribunal retains as to any reversion to any aspects of his past behaviour and offending, and the very firm and considered views the Government and the community hold concerning family violence.

157. The Tribunal has formed the view that the Primary Consideration 2, family violence, weighs against the revocation of the cancellation of the Applicant's visa.

Primary Consideration 3: The Strength Nature And Duration Of Ties To Australia

158. Paragraph 8.3 of the Direction provides:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are*

Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(4) Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) *the length of time the non-citizen has resided in the Australian community, noting that:*

i. *considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and*

ii. *more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and*

iii. *less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.*

159. The Applicant states he has ties to the Australian community through his de facto partner (who recently became an Australian citizen) and their two minor children, a daughter aged two and a half years and a son aged almost one and a half years who are both Australian citizens.

160. The Applicant claims, and supported by the Applicant's partner in her own oral testimony and statement, that a non-revocation decision will cause significant emotional, financial and practical hardship to the Applicant's partner and their children.

161. The Applicant claims he has contributed positively to the community through his volunteer work at the Fairfield Food Service, whilst he also claims his time in Australia, over ten years at the time of the Tribunal's decision, represents a considerable period of time and is demonstrative in its own right of his ties.

162. The Applicant has also submitted that his offending should not be characterised as "offending soon after arriving in Australia" as he did not appear before a Court until 18 June 2015, some 937 days after arriving in Australia on 23 November 2012.

163. The Tribunal has considered the Applicant's two biological Australian citizen children under the best interests of the child consideration.

164. The Tribunal accepts that the Applicant is in an ongoing de facto relationship with his Australian citizen partner, and the relationship first commenced in May 2019. The Tribunal accepts that, despite the Applicant's partner being a victim of his family violence, she remains committed to the Applicant and the relationship. The Applicant's partner has given evidence that the Applicant provides her with ongoing financial support as well as emotional and practical support. The Applicant's partner gave evidence at the Tribunal hearing that she receives government assistance through Centrelink as well as financial support from the Applicant. The Applicant's partner states that she receives no other support. The Tribunal accepts the claim that she is dependent on the Applicant for financial, emotional and practical support, notwithstanding the financial support she receives from the government. The Tribunal considers the Applicant's ties to the Australian community through his relationship with his Australian citizen wife are significant.

165. The Applicant's partner states she only has a cousin in Australia and no other support network, making raise their two young children by herself challenging. The Applicant's partner has stated she has not talked to her own father for over a decade, having been taken from him by the Department of Community Services and raised in a refuge. She states *"I have not had an easy life"*, a statement the Tribunal accepts.

166. The Applicant's wife writes in her statement of 7 July 2023 in relation to the Applicant *"I love him dearly. I will not allow another man to enter my life. I will, in the fullness of time, marry [YVBM]".*

167. The Tribunal has considered the impact of its decision on the Applicant's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely. They are the Applicant's partner and his two biological children. The Tribunal considers the impact will be significant and it will have an adverse effect on both the Applicant's partner, who remains totally committed to the Applicant, and on his two young children who, whilst very young, have a desire to be with their father. The Applicant's partner in her oral testimony discussed her daughter's love for her father. The Tribunal also notes the evidence as to the stress and anxiety the Applicant's partner has faced, and the challenges she has endured in raising their children essentially alone. The Tribunal has taken into account the report by psychologist Dr Massoud Amani as to the state of mind of the Applicant's partner. The Tribunal accepts these challenges, and this hardship will be exacerbated in a non-revocation decision. As per the Direction, in considering the Applicant's ties to Australia, it has attributed more weight to these ties given the Applicant's partner and children are all Australian citizens who have a right to remain in Australia indefinitely. The Tribunal gives significant weight in favour of revocation of the cancellation of the Applicant's visa based upon his relationship with his partner and their two young Australian citizen children, and the considerable hardship a non-revocation decision will cause.

168. The Tribunal has also taken into account written character statements from the Applicant's employer, friends, work colleagues and the Applicant's partner's Australian citizen cousin Ms BG[8] who have all attested to the Applicant's good character and his links to the Australian community, including in areas such as volunteering as well as his sound employment record. His long-term employer has attested to the excellent contribution he has made at the company. The Tribunal accepts the Applicant has built some genuine relationships in the Australian community and has made a positive contribution in areas like employment and economic activity. The Tribunal has taken into account the strength,

[8] G3L, 189–196

duration and nature of these links since 2012 and gives them some weight in the Applicant's favour. The Tribunal also accepts that whilst residing in Australia for over a decade the Applicant has contributed positively to the Australian community through his ongoing gainful employment and the work he undertook in the community through volunteering during that time. The Tribunal has given some positive weight to the Applicant for such reasons.

169. The Tribunal notes the Direction also states that less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the noncitizen began offending soon after arriving in Australia. The Tribunal notes that the Applicant did not arrive in Australia until he was 23 years of age. Subsequently, he did not arrive in Australia during his formative years.

170. The Applicant has claimed his offending only commenced 937 days after his arrival in Australia, based on the fact the Applicant did not appear before a Court until 18 June 2015, some 937 days after arriving in Australia on 23 November 2012. The Tribunal rejects the Applicant's contention, noting, as discussed by the Respondent, the first offending actually occurred about one year, 11 months after his arrival in Australia when he was received an infringement notice for *Exceed speed limit by more than 30km/h but not more than 45 km/h whilst driving a motor vehicle*. The offending is to be determined by the date of the offending rather than the conviction. Given this fact, the Tribunal accepts the Respondent's contention that the offending of the Applicant began relatively soon after arriving in Australia and gives the consideration lesser weight than the significant weight it might otherwise have done.[9]

171. The Tribunal considers the Applicant's strength, nature and duration of her ties to Australia, despite him being in Australia since 2012, are relatively strong through his Australian citizen partner and Australian citizen children. The Tribunal accepts he is supporting his family, and he has been a diligent and committed employee whilst part of the local workforce over many years.

172. The Tribunal has formed the view that the Primary Consideration 3, the strength, nature and duration of ties to Australia, weighs heavily in favour of the revocation of the cancellation of the Applicant's visa.

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[9] Direction 99, 8.3(4)(a(iii).

Primary Consideration 4: The Best Interests Of Minor Children In Australia

173. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA of the Act is in the best interests of a child affected by the decision. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

174. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia in Paragraph 8.4(4) which relevantly include the nature and duration of the relationship between the child and the non-citizen.

175. The Applicant has submitted he has two biological children: a daughter aged two and a half years, along with a son who is 1 year of age at the time of the Tribunal's decision. The Applicant has submitted that the children reside with their mother, the Applicant's partner.

176. The Applicant was taken into custody on 30 August 2022 when the Applicant's daughter was one year and 8 months old whilst his son was only three-months old. The Applicant has been separated from his children since this time, almost a year. The Applicant states he nevertheless enjoys a close relationship with his children, speaking to them on the telephone every day and building a relationship with them as best as he can whilst in immigration detention.

177. The Applicant's partner and mother of the children discussed the relationship at the Tribunal's hearing:

DR DONNELLY: What kind of relationship, as best you know, does YVBM have with your children?

APPLICANT'S PARTNER: He loves them very much, his kids they love him very very much. He just has done his – whatever he can, he does it for his kids, and since he's been into detention centre and prison, my daughter she has been crying. She has been very very – I can tell she's very upset, she's very angry, and every time she sees the photo of her father, YVBM's photo, she starts crying, and she calls like "dad." Every time my phone rings, she starts running towards my phone, and she calls "dad." And she's been talking – when he was at the detention centre, I was allowed to call him because I changed that AVO, and then we've been – like, she's been talking to him every day, so she does have a very loving relationship.

DR DONNELLY: When you say they talk every day, how do they talk?

APPLICANT'S PARTNER: Video call with FaceTime.

DR DONNELLY: FaceTime, and that's through just the iPhone?

APPLICANT'S PARTNER: Yes.

DR DONNELLY: I see, what about your son, Tian?

APPLICANT'S PARTNER: My son he (indistinct) little.

DR DONNELLY: Yes?

APPLICANT'S PARTNER: But he does know him because we do quite a lot, have been doing FaceTime like, for a year now. And we have visited YVBM at Villawood Detention Centre, so my son, he knows who he is because he is the only man I have in my life

178. The Applicant states he wishes to play a positive and ongoing parental role with his children. *He states he wishes to go on providing them with financial support as well as emotional and practical assistance. He contends a non-revocation decision would cause considerable hardship as without him being in the community he will not have the capacity to re-enter the workforce and earn an ongoing income.*

179. The Applicant contends that a non-revocation decision will continue his physical separation from his children which will have a detrimental impact upon them from an emotional perspective and from a development point of view.

180. The Applicant also submits that his partner, the mother of his children, is struggling currently with raising the children alone without any meaningful family support as a single parent.

181. The Applicant also submits that it would be unlikely that his children would be exposed to family violence in the future given his rehabilitation and his commitment to be a better father and a law-abiding and constructive member of the community.

182. The Tribunal has considered the best interests of the Applicant's children. Both are Australian citizens and resident in Australia, so relevant for the purposes of this consideration. The Tribunal accepts the Applicant has been in a parent/child relationship with his two children since they were born. Whilst the Applicant has been separated from the children by gaol and immigration detention, the Tribunal is satisfied he is committed to the best interests of his children. The Tribunal accepts that he loves his children and has supported them financially both previously and today. The Tribunal considers, if the Applicant is true to his word, that he can play a positive role in the children's future, noting it is a significant period of time until both turn eighteen years of age. The Tribunal notes that an AVO currently precludes physical contact between the Applicant and his partner until September 2024 – the Tribunal accepts however the claim of the Applicant's partner that she is seeking to withdraw the AVO as a priority in order to reunite their family.

183. The Tribunal accepts that the Applicant's partner, with little family support, has struggled in raising the children by herself, despite the financial support she receives from the government. The Tribunal accepts that this hardship will continue should the cancellation not be revoked.

184. The Tribunal agrees with the Applicant that electronic and telephonic communication, whilst undoubtedly useful, is not the same as physical contact and communication, especially for young children. The Tribunal accepts the Applicant has a good relationship with his children and all parties will suffer emotional and mental hardship if the Applicant if the cancellation of the Applicant's visa is not revoked and the parties remained separated, potentially for a very considerable period.

185. Whilst it is difficult, given the age of the children, to ascertain their own views, the Tribunal has taken into account the oral testimony of the Applicant's partner and other evidence that suggests the children would prefer to be reunited with the Applicant as their father: Paragraph 8.4(4)(f) of Direction 99.

186. The Tribunal notes Paragraph 8.4(4)(g) of Direction 99 that states a decision-maker must take into account *evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally.* In April 2022 the Applicant's daughter witnessed the deplorable situation where the Applicant kicked his partner, her mother. Whilst the Applicant's partner was not injured, she was heavily pregnant, and the incident would have caused extreme distress and fear to her. Whilst the Applicant's daughter was very young at the time, and there is no evidence before the Tribunal that the child suffered or experienced any physical or emotional trauma arising from the Applicant's conduct (Paragraph 8.4(4)(h)), the Tribunal nevertheless notes the Applicant's daughter was a witness, and the Tribunal must take this into account when attributing how much weight to give to this consideration.

187. There is no evidence or claim before the Tribunal that the Applicant's children themselves have been the victims of family violence perpetrated by the Applicant.

188. On the basis of all the evidence before it, the Tribunal finds that a decision to not revoke the cancellation of the Applicant's visa would adversely affect the best interests of his two children.

189. The Tribunal notes the claims made pertaining to the Applicant partner's daughter IF who is eleven years of age at the time of decision. The Applicant has submitted the non-revocation of the cancellation of his visa will adversely impact her and is relevant to the best interests of the child consideration.

190. The Tribunal accepts that the Applicant has a sound relationship with his stepdaughter. The Applicant and his partner have both claimed the Applicant has provided gifts to her on birthdays and the parties have a good relationship. The evidence before the Tribunal is that IF lives with her grandmother who to all intents raises her. The Applicant's partner in her written statement of 7 July 2023 writes *"IF considers me more like a friend than her mother."*

191. Whilst the Tribunal accepts the Applicant may have a sound relationship with IF, the Tribunal considers the impact of the non-cancellation of the Applicant's visa is limited upon her. She is living with her grandmother and the evidence suggests her grandmother is the one fulfilling a parental role. The Tribunal furthermore notes, as outlined in subparagraph

8.4(4)(a), that less weight should be given if the relationship is a non-parental one. In the Tribunal's opinion, the relationships between the Applicant and his stepdaughter Isabella cannot be considered as having the same weight and importance as a parental relationship. The Applicant submits that he keeps in contact with Isabella via electronic means. If this is the case, the Applicant will still be able to maintain such contact should the cancellation not be revoked, and he be required to depart Australia. The Tribunal places some weight, but only a limited amount of weight, in favour of revocation based upon the best interests of the Applicant's stepdaughter.

192. The Tribunal however has placed a considerable amount of weight on the best interests of the Applicant's two young Australian citizen children. The Tribunal accepts the relationship with his children will be very different if he is not able to perform parental responsibilities and continue building a parental relationship with his children at their younger, formative years. The Tribunal accepts that the Applicant's partner has struggled raising the children by herself, and she would be assisted by the Applicant playing a meaningful role in supporting and caring for their children. The Tribunal concludes that the best interests of the Applicant's children will be adversely impacted should the cancellation of his visa not be revoked.

193. The Tribunal has formed the view that the Primary Consideration 4, the best interests of minor children in Australia, weighs heavily in favour of the revocation of the cancellation of the Applicant's visa.

Primary Consideration 5 – Expectations Of The Australian Community

194. In making the assessment for weight to be allocated to Primary Consideration 5, paragraph 8.5(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. The Tribunal should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, this expectation by engaging in serious conduct. Paragraph 8.5(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian

Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

> *a) acts of family violence; or*
>
> *b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
>
> *d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*
>
> *e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or;*
>
> *f) worker exploitation.*

195. Paragraph 8.5(3) of the Direction provides that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

196. Paragraph 8.5(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

> *This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.*

197. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs*.[10] In *FYBR*, the Court affirmed the approach, established in previous authorities, that it is not for the Tribunal to determine for itself the expectations

[10] [2019] FCAFC 185 ("*FYBR*").

of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[11]

198. Paragraph 8.5 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government, which the decision maker must have regard to.

199. The Applicant concedes that by committing acts of family violence, serious offences against women and an offence against the Police, he has contravened the normative expectation of compliance with the law. These particular offences furthermore are relevant to Paragraph 8.5(2) of Direction 99. which directs that a visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. The Applicant concedes his criminal offending, in its totality, is very serious and the consideration weighs against revocation of the cancellation of his visa.

200. The Applicant has contended that the Tribunal can nevertheless have regard to his individual circumstances,[12] which he submits considerably moderates the adverse weight that should be attributed against revocation of the cancellation of his visa.

201. In this regard, the Applicant has submitted his decade plus residence; his relationship with an Australian permanent resident (now citizen); his two minor children; his rehabilitation efforts whilst in detention; the impediments he would face if returned to Iran; international non-refoulment obligations; and the legal consequences of an adverse decision are all individual circumstances that ought to moderate the weight given against revocation of the mandatory cancellation of his visa:

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[11] See *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500.

[12] *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559.

DR DONNELLY: But one thing that I will say, which is not in the minister's written submissions, is there are a number of authorities in the Federal Court of Australia, to the effect that in attributing weight to primary consideration of expectations of the Australian community, the tribunal can have regard to the personal circumstances of the non-citizen here.

The personal circumstances involve a non-citizen who has been in detention for three times his prison sentence, had undertaken rehabilitation, has persisting mental health issues. And if the tribunal doesn't revoke the mandatory cancellation decision, he's looking at prolonged indefinite detention in the sense of no fixed chronological end point. Now, that is a significant matter the tribunal can take into account in attributing weight to this primary consideration. And of course, the applicant's been in Australia for more than a decade, and that's also relevant to the attribution of weight. So although this primary consideration weighs against the Applicant, it's open to the tribunal to offset the weight, in my respectful submission, it should so do so in the circumstances of this case.

202. The Tribunal notes the Applicant's contentions and would note that each of the circumstances the Applicant has submitted have been considered by the Tribunal in this decision record, and given requisite weight, under the various considerations in this decision.

203. The Tribunal would furthermore once again draw the Applicant's attention to *FYRB*, noting the authority that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances.

204. The Tribunal also notes the Applicant's contentions that he is rehabilitated and a now a low risk of reoffending as relevant. The Tribunal would note that the Direction specifically states that the expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

205. The Respondent submits that given the nature of the Applicant's offending; the Australian community would expect that the Applicant's visa would remain cancelled.

206. The Tribunal has considered this primary consideration by considering the Applicant's offending — conduct which the Tribunal found was 'very serious'. The subsequent question

before the Tribunal is what is the expectation of the Australian community concerning a visa-holder who has engaged in very serious offending like that of the Applicant.

207. In the case of the Applicant, his offending behaviour has engaged the principle in paragraph 8.5(2). The Tribunal subsequently agrees with the Respondent's submissions that given the nature of the Applicant's offending, the Australian community would expect that the Applicant's visa would remain cancelled. The Tribunal notes that the Applicant's repeat offending has included multiple incidents of family violence and violence against women. The Direction specifically states that there is an expectation of cancellation where serious character concerns are raised due to the commission of certain types of conduct, including family violence. In the circumstances of this case, the Tribunal considers it means the Australian community has an expectation that the Australian Government can and should cancel the Applicant's visa.

208. The Tribunal notes that the Applicant has been convicted of offences that involve acts of family violence. The Tribunal has found the Applicant engaged in 'very serious' offending. through a range of offences involving multiple convictions for common assault; contravene prohibition/restriction in an AVO, stalk/intimidate intend fear physical etc harm; and resist officer in execution of duty – T2. Notwithstanding the Applicant's explanation for this offending, and the factors he has submitted, the Tribunal concludes that community expectations would weigh against revocation of the cancellation of the Applicant's visa.

209. The Tribunal has formed the view that Primary Consideration 5, Expectations of the Australian Community, weighs heavily against the revocation of the cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

210. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. Paragraph 9 of the Direction provides that the decision-maker must take 'other considerations' into account where relevant, and these considerations include, but are not limited to, the legal consequences of a decision under section 501 or section 501CA of the Act; the extent of impediments to the non-citizen if removed; the impact on victims; and impact on Australian business interests.

(a) Legal consequence of the decision

211. Paragraph 9.1 of the Direction states:

9.1 Legal consequences of decision under section 501 or 501CA

(1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing.

(3) International non-refoulement obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a non-refoulement claim.

212. In this case the Applicant, whilst he previously held a Class XB Subclass 200 Refugee (Permanent) visa, for the purposes of this review he is not covered by a protection finding. Paragraph 9.1.2 is therefore relevant:

9.1.2 Non-citizens not covered by a protection finding

(1) Claims which may give rise to international non-refoulement obligations can also be raised by a non-citizen who is not the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.

(2) However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether non-refoulement obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.

(3) Non-refoulement obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate

conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen makes a valid application for a protection visa, the non-citizen would not be liable to be removed while their application is being determined.

213. The Tribunal has considered the Applicant's statement of 6 July 2023 where he writes "I cannot go back to Iran. I will be persecuted and risk serious harm if returned to my home country. I am a political refugee from Iran. Previously, I participated in political protest against the administration of Iran." He further states *"I was previously tortured by the Iranian authorities in Ahvaz, Iran. I had been participating in political protest. I was taken. I was placed in a small room that was dark. I was the subject of physical violence. I was beaten with a metal object. A cloth was placed over my face. The torturer then proceeded to place water all over my face and mouth to choke me. I was tasered. Subsequently, after a period I was permitted to leave. My father gave the authorities house papers in exchange for my release. Subsequently, after this occurred, I fled Iran and went to Turkey'.*

214. At the Tribunal's hearing the Applicant provided similar further detailed testimony of his fear of serious harm if he returned to Iran, and of events preceding his departure to Turkey over a decade ago. He claims a well-founded fear of persecution for reasons of political opinion and membership of a particular social group, the Applicant submitted that he would be persecuted for reasons of political opinion and imputed political group. At the Tribunal's hearing he also submitted that as a returning Iranian citizen that was granted a humanitarian visa and has a criminal record, he would also be persecuted as a member of a particular social group. He claims the real chance of persecution exists in all areas of Iran. The Applicant, furthermore, claiming he has already faced torture and suffered serious harm in the past, has also submitted the complimentary protection provisions in s36(2)(aa) of the Act are relevant, as he faces a real chance of significant harm within the meaning of s 36(2A) of the Act. The Applicant submitted a range of country information in support of his claims that he would face a risk of harm if returned to Iran such as the most recent 'Smarttraveller' report for Iran (6 July 2023) and the DFAT Country Information Report for Iran dated 14 April 2020.

215. The Applicant submitted that the legal consequences of a decision weighed in favour of revocation of the cancellation. He submits that a non-revocation decision would result in his prolonged detention until he was either removed from Australia or granted another visa.

Should he be removed from Australia, he will be permanently excluded from returning.[13] The only other real option for the Applicant would be to apply for a Protection visa, however that would likely be refused on character grounds.

216. The Applicant strongly submits that the Tribunal should not defer consideration of his non-refoulment claim, despite it being an option.[14] This is because, namely, his visa that was cancelled —(Class XB Subclass 200 Refugee (Permanent) visa) — has criteria that overlaps with the criteria for the grant of a protection visa; the Respondent has already had sufficient time to address the Applicant's non-refoulment claims; deferral by the Tribunal of the Applicant's non-refoulment claims would *"undermine public trust and confidence in the decision-making of the Tribunal"*, and deferral of the non-refoulment claims would lead to further prolonged immigration detention. The Applicant submits that even if a protection finding was found, the Minister would refuse the application on character grounds.

217. Finally, the Applicant has submitted that his risk of harm claims are another reason to revoke the cancellation decision entirely independently of the international non-refoulment claims.

218. The Respondent contends that the appropriate course is for the Tribunal to defer an assessment of whether the Applicant's claims engage Australia's non-refoulment obligations under the Act. This course is consistent with the High Court's decision in *Plaintiff M1/2021*, where the primary question was whether a delegate, when considering whether there was 'another reason' to revoke the cancellation of an applicant's visa pursuant to sub-para 501CA(4)(b)(ii) of the Act, was required to consider the representations which raised a potential breach of Australia's international non-refoulment obligations in circumstances where the applicant was able to make a valid claim for a protection visa. By majority the High Court found that *"to the extent Australia's international non-refoulment obligations are given effect in the Act, one available outcome for the delegate was to defer assessment of whether the applicant was owed the non-refoulment obligations, on the basis that it was open to the applicant to apply for a protection visa.'*[15]

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[13] *Pearson v Minister for Home Affairs [*2022] FCAFC 203 [55].

[14] *Plaintiff M1-2021*.

[15] Ibid [30] (Kiefel CJ, Keane, Gordon and Steward JJ).

219. Whilst it is clearly not obliged to do so, the Tribunal has considered the Applicant's claims that he is owed non-refoulment obligations that may provide 'another reason' why the cancellation decision should be revoked. The Tribunal has considered the country information provided by the Applicant and his previous statements to the Tribunal, the delegate and whilst in detention. The Tribunal has considered the findings of the UNHCR when finding the Applicant was a Political Refugee, leading ultimately to the grant of his Class XB Subclass 200 Refugee (Permanent) visa in 2012. The Tribunal notes that the Respondent concedes the Applicant's claims *"are broadly consistent"* with the claims made to the UNHCR and *"the claims appear to be credible"*. The Tribunal furthermore notes that the nature of the Applicant's claims *"are likely to give rise to international non-refoulment obligations"*.[16]

220. On the basis of the information before it, the Tribunal concurs that the Applicant's claims are likely to engage Australia's non-refoulment obligations, with the country of reference being Iran. The Tribunal considers that a conclusive finding as to whether non-refoulment obligations are in fact owed in respect of the Applicant is not possible however without a full, thorough and comprehensive assessment of his claims through the protection visa application process. Nevertheless, the Tribunal finds that the likelihood that the Applicant engages Australia's non-refoulment obligations weighs in favour of the exercise of the discretion to revoke the mandatory visa cancellation decision.

221. The Tribunal has also had regard to the practical consequences of its finding that the Applicant is likely owed non-refoulment obligations. If the mandatory cancellation is not revoked, the Applicant will remain in immigration detention whilst his protection visa (whilst he expressed some uncertainty at applying at the hearing due to the costs of utilising a lawyer, the Tribunal considers the more likely scenario, after being informed he could lodge an application without counsel, is that he would lodge such an application) is assessed. Whilst such detention in those circumstances may not ultimately be indefinite, it may be a significant period of time, and the Tribunal notes the evidence of the Applicant as to his mental health and the corrosive impact that ongoing detention has caused him. The Tribunal notes the Applicant has already been in immigration detention for over nine months.

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[16] Respondent's SFIC, [55].

222. In relation to the matter of indefinite detention, the Tribunal has considered the Applicant's situation. It is an agreed fact that if the Applicant's visa is cancelled, he faces the prospect of indefinite detention given he cannot be removed to Iran on an involuntary basis. The Tribunal notes that the Respondent concedes that even if the Applicant satisfies the criteria for the grant of a Protection visa, his visa could still be refused on character grounds, and in such circumstances the Applicant would potentially remain in detention indefinitely: the Respondent's own submissions state that the potentiality of indefinite detention "should be given meaningful weight in favour of revocation" of the mandatory cancellation. The Tribunal would concur with the contentions of the parties in relation to indefinite detention, and accepts the Applicant could otherwise potentially spend a very significant period of time remaining in immigration detention. The Tribunal weighs the matter of indefinite detention in favour of the revocation of the mandatory cancellation.

223. At the Tribunal's hearing the previous statement of the Applicant to a Counsellor whilst in immigration detention that he had 'multiple houses and money in Iran' and he would return if he didn't have children was noted. The Respondent has flagged this statement as a potential credibility concern about the Applicant's protection claims. The Tribunal considers any issues as to this statement, and the context of the making of such a statement, is best considered in the context of the assessment of a future protection claim. The Tribunal notes the Respondent's concerns but also notes other evidence that suggests the Applicant's claims are likely to engage Australia's international non-refoulment obligations.

224. For all these reasons, the Tribunal finds that the Other Consideration 'Legal consequences of a decision' weighs in favour of revocation of the decision to cancel the Applicant's visa.

225. For completeness, the Tribunal notes that it concurs with the Respondent that any assertion (as made by the Applicant) that the Minister would refuse any protection visa application on character grounds is entirely speculative. Protection claims would be assessed as per s 36A of the Act prior to the consideration of any character concerns, which would be considered in such a context.

226. The Tribunal also rejects the statement of the Applicant that the Tribunal should not defer consideration of the non-refoulment claim as the Minister has already had "sufficient time" to address these claims given revocation was sought on 22 October 2022. Deferral of the

consideration by the Minister (and the Tribunal for that matter in the context of this review) is entirely consistent with *Plaintiff M1-2021*.

227. The claim the criteria for the Applicant's Class XB Subclass 200 Refugee (Permanent) visa is similar to that of a Protection visa as a reason for not deferring consideration is not accepted by the Tribunal. The Applicant quite simply has not been the subject of a formal Protection finding in the context of this review. He may be able to obtain such a finding by lodging a Protection visa application.

228. The Tribunal also rejects the claim of the Applicant that deferring the non-refoulment claim would undermine public trust and confidence in the decision-making in the Tribunal. The Tribunal finds the claim curious and somewhat unnecessarily provocative. The potential deferral of the claim by the Tribunal has clearly been contemplated by the High Court in *Plaintiff M1-2021.* In the circumstances of this particular review, the Tribunal has reviewed the evidence and concurred that the Applicant's claims are likely to engage Australia's non-refoulment obligations. The Tribunal weighed the relevant consideration in favour of the revocation of the cancellation of the Applicant's visa. The Tribunal, whilst giving some weight in favour of the Applicant, ultimately considered a full, thorough and comprehensive assessment of the Applicant's claims through the protection visa application process was in the circumstances appropriate. The Tribunal considers following such processes consistent with judicial authority rather than an undermining in public trust and confidence in the Tribunal's decision making abilities.

229. The Tribunal has formed the view that the Other Consideration (a), legal consequences of the decision, weighs in favour of revocation of the decision to cancel the Applicant's visa.

(b) Extent of impediments if removed

230. Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

(a) the non-citizen's age and health;

(b) whether there are any substantial language or cultural barriers; and

(c) any social, medical and/or economic support available to that non-citizen in that country.

231. The Applicant is 33 years of age. The Applicant states that he suffers from mental and psychological health challenges due to his anxiety and depression. The Applicant whilst in detention has been receiving regular treatment from both a counsellor and a psychologist. At the Tribunal's hearing the Applicant stated he has seen his *counsellor "twenty to thirty times"* and generally sees the counsellor every seven to ten days. He stated that he consults the psychologist about every three weeks. The Applicant is also taking the medication Avanza to address issues he faces with anxiety, depression and sleeping disorders. The Tribunal has taken into account the progress notes of the Applicant's psychiatrist Dr David Lienert who diagnoses a stress and adjustment disorder related to ongoing detention as well as a background or complex Post Traumatic Stress Disorder. The Respondent accepts the Applicant has mental health issues and is receiving treatment. The Tribunal is satisfied the Applicant has a range of mental health challenges and has benefited from the treatment he has received from medical professionals. Whilst the Tribunal does not consider the Applicant's age an impediment to his return to Iran, the Tribunal does consider that the Applicant's mental health, and the treatment he is receiving for his mental health, are an impediment to the Applicant's return to Iran, even if he were to potentially receive treatment in Iran comparable to "what is generally available to other citizens of that country".[17]

232. The Tribunal has considered whether there are any substantial language or cultural barriers to the Applicant should he be removed. The Applicant conceded there were no real barriers. The Applicant stated that he is fluent in Farsi and spent his formative years in Iran. He is familiar with the culture of Iran. His mother and sister are each resident in Iran today who may be able to provide him with support until he can find employment and accommodation. The Tribunal considers it may take him time to adjust to life in Iran given he has been away for over a decade. The Tribunal finds the Applicant will not face any cultural, social or linguistic barriers that will prevent him re-establishing himself in Iran.

233. The Tribunal has taken into account the extent of any impediments the Applicant may face in relation to the social, medical and/or economic support available to the Applicant in Iran.

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[17] Direction 99 [9.2(1)].

The Tribunal notes from the Country Information supplied by the Applicant that he will not be eligible for unemployment benefits and financial support in Iran. This is not contested by the Respondent. Whilst he may potentially be able to acquire some economic support from his family in Iran, the Tribunal weighs the impediments the Applicant may face in relation to economic support gives some weight in his favour.

234. In relation to social support available to the Applicant, the Tribunal again recognises the Applicant's mother and sister are resident in Iran. The Applicant has an ongoing relationship with his mother and sister, so the Tribunal is satisfied they will provide him with some social support and assistance, despite the Applicant's claim his mother is elderly and his sister wishes to leave Iran for Germany. The Tribunal notes however that the Applicant would be separated from his two biological children and long-term partner. This will cause him considerable emotional hardship. The emotional hardship and distress that the Applicant may suffer from separation from his immediate family in Australia will negatively impact upon the Applicant's mental health and adversely impact on his ability to both obtain employment and reintegrate into the Iran community.

235. The Tribunal notes that the Applicant has raised the risk of the Applicant facing harm if returned to Iran as an impediment to his removal to Iran. This is raised separately from his international non-refoulment claims.[18] The Applicant contends that even a small risk of harm can be given great weight.[19] The Tribunal accepts the proposition that given the Applicant's claims about harm he may face if returned to Iran and the country information provided, claims the Tribunal accepts appear credible, the Tribunal accepts the proposition that he may be at risk of facing harm if returned. The Tribunal notes this is not disputed by the Respondent. The Tribunal weighs this impediment of the risk of harm in the Applicant's favour.

236. The Tribunal has formed the view that the Other Consideration (b), extent of impediments if removed, weighs in favour of revocation of the cancellation of the visa.

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[18] *Minister for Home Affairs v Omar* [2019] FCAFC 188, [40].

[19] *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, [49].

(c) Impact on victims

237. Paragraph 9.3 of the Direction directs a decision-maker to take into account the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

238. The Applicant has stated that given the Applicant's partner was the victim of his domestic violence offending, and she has forgiven him and does not fear him, this evidence should be given appropriate weighting in the Applicant's favour in relation to the other consideration pertaining to the impact on victims. In her oral testimony to the Tribunal's hearing, the Applicant's partner stated she had forgiven the Applicant for his past offending, was not in fear of him, and simply wanted him to be able to return home with her and their two children. It was pointed out that she had amended the existing AVO to allow telephone and video contact between the Applicant and herself. She stated she would shortly apply to amend the AVO (which has less than a year to run) so the Applicant can return home.

239. The Applicant has claimed, given this evidence, his partner is entitled to the limited agency provided for victims in Paragraph 9.3(1) of Direction 99.[20]

240. The Respondent accepts the Applicant's partner has forgiven him and does not fear him. The Respondent however submits the evidence that the Applicant has forgiven him and wishes him to remain in Australia is dealt with under the primary consideration pertaining to the strength, nature and duration of ties to Australia. The Respondent contends in their SFIC that the Applicant partner's general desire the Applicant remain in Australia should not be considered as a factor in favour of revocation under this *consideration '…[unless the Tribunal is satisfied] that there [is] some aspect of [their] evidence as a victim as compared with their evidence as a [family member*']. [21].

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[20] *PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235, [93].

[21] *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646, [27] – [28] (Perram J).

241. Having considered the evidence of the Applicant's partner, the Tribunal is satisfied that her evidence has been provided as a family member of the Applicant rather than as his victim. Her contentions are clearly framed from the perspective as his de facto partner and mother of his children. The Tribunal agrees with the Respondent's contentions as to how this evidence should be weighted, and has subsequently weighed this evidence from the Applicant's partner in the Applicant's favour as relevant to the primary consideration of the strength, nature and duration of ties to Australia. The Tribunal has weighed this evidence significantly in the Applicant's favour, but under paragraph 8.3 of the Direction only. The Tribunal has not provided double weighting for these contentions in relation to the impact on victims consideration.

242. There is no information before the Tribunal about any other victims of the Applicant's past offending.

243. The Tribunal has formed the view that the Other Consideration (c), impact on victims, weighs neither in favour nor against revocation.

(d) Impact on Australian business interests

244. Paragraph 9.4 of the Direction directs a decision-maker to take into account the following:

> *Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.*

245. The Applicant has stated this paragraph does not apply in the circumstances of this case.

246. The Respondent notes the Applicant's statement that the consideration is not relevant. The Respondent has however noted the information on the file pertaining to the Applicant's employer who has asserted the Applicant is a valuable employee. The Respondent has contended that this consideration should not be given any weight as any decision will not significantly compromise the delivery of a major project, or delivery of an important service, in Australia.

247. The Tribunal finds that removal of the Applicant from Australia would not have any impact on Australia's business interests. The removal of the Applicant will not significantly compromise the delivery of a major project or delivery of an important service in Australia.

248. The Tribunal has formed the view that the Other Consideration (d), impact on Australian business interests, weighs neither in favour nor against revocation.

Findings: Other Considerations

249. The application of the Other Considerations in the present matter can be summarised as follows:

(a) **legal consequence of decision under s501 or s501CA:** weighs in favour of revocation.

(b) **extent of impediments if removed:** weighs in favour of revocation.

(c) **impact on victims:** weighs neither in favour nor against revocation.

(d) **the impact on Australian business interests:** weighs neither in favour nor against revocation.

CONCLUSION

250. The Applicant does not satisfy the character test. The Tribunal has subsequently considered whether there is another reason the decision to cancel his visa should be revoked. The Tribunal has weighed these considerations in accordance with the Direction.

251. As already noted, Primary Consideration 1, the protection of the Australian community weighs heavily against revocation. The Applicant has engaged in conduct viewed very seriously by the Australian Government and the Australian community. His offending has included acts of family violence, crimes of a violent nature against women, and offending against a Police officer. The Applicant's offending has increased in recent years, and the Tribunal has taken into account the cumulative effect of his repeated offending. The Tribunal has also taken into account the risk to the Australian community should the Applicant engage in further offences or engage in further serious conduct. The Tribunal has taken into account the nature of harm to individuals or the Australian community should the Applicant

engage in further criminal or serious conduct. This conduct includes common assault, further incidents of family violence, and the breach of further AVOs put in place to protect victims as well as an appalling record on our roads. The Tribunal has also taken into account the likelihood of the Applicant reoffending, noting his recidivist behaviour.

252. The Tribunal notes that Primary Consideration 2, Family violence committed by the non-citizen, weighs heavily against revocation. The Applicant has committed a significant number of offences that involve family violence, including a family violence incident in front of one of his young children. The Applicant's recidivism and his preparedness to ignore multiple AVOs in relation to his partner remains an issue of genuine concern and the Tribunal retains concerns that the Applicant remains a risk of reoffending.

253. The Tribunal has weighed Primary Consideration 3, the Strength, Nature and Duration of ties to Australia heavily in favour of the revocation of the cancellation of the Applicant's visa. The Applicant has been in Australia for almost eleven years and has developed some significant ties, most obviously with his two Australian citizen children aged two and a half and one respectively. The Applicant's partner since 2019, and mother of his children, represents another strong tie to Australia despite the Applicant spending his formative years offshore. The Applicant has developed further links through his strong employment in Australia where he has developed a number of colleagues and friendships.

254. The Tribunal has weighed Primary Consideration 4, The Best Interests of Minor Children, heavily in favour of the revocation of the cancellation of the Applicant's visa. The Applicant's two Australian citizen children reside with their Australian citizen mother. The evidence before the Tribunal is that the Applicant is close to his children and all parties wish him to play an important and ongoing role with their development in their formative years. The Tribunal found the testimony in relation to their children from the Applicant and his partner to be genuine.

255. The Tribunal has weighed Primary Consideration 5, Expectations of the Australian Community, heavily against the revocation of the cancellation of the Applicant's visa. The Tribunal considers that, given the nature of the Applicant's offending, the Australian community would expect that the Applicant's visa to remain cancelled. The Tribunal notes that the Applicant's repeat offending has included multiple incidents of family violence, violence against women and offending against the Police. The Direction specifically states

that there is an expectation of cancellation where the serious character concerns are raised due to the committing of certain types of conduct that include family violence.

256. The Tribunal has considered the other considerations. The considerations concerning the legal consequences of the decision under s501 or s501CA are especially significant. The Applicant is an Iranian national. Whilst the Tribunal declined to make formal protection findings, the Tribunal does note that the Applicant was previously found to be a political refugee by the UNHCR in Turkey and, on the evidence, his claims appear credible and he may be owed international non-refoulment obligations. While he has not presently applied for a Protection visa, the Tribunal considers, based on his evidence at its hearing, that it is at least something he would contemplate. He cannot be returned to Iran and indefinite immigration detention remains a possibility. Given all the evidence concerning the legal consequences of the decision, the Tribunal weighs this consideration in favour of the revocation of the cancellation of the Applicant's visa.

257. In relation to the other consideration concerning the extent of impediments if removed, the Tribunal considers the Applicant's age is of no significant barrier should he return to Iran, nor does he face any language or cultural barriers. He also has his mother and sister present in Iran to support him. Whilst the Applicant would be able to access the same medical support as any other Iranian national, the Tribunal does accept his mental health, and the treatment and counselling he currently receives remains a live issue when considering impediments he would face. The risk of harm if returned to Iran (separate from international non-refoulment obligations) is a matter of concern whilst the Tribunal also notes he will be unable to access government financial support should he return. Of particular note as an impediment is the Applicant's separation from his Australian citizen partner and two young children. The Tribunal accepts separation would cause considerable hardship to the Applicant, his partner and his children, and accepts relocation to Iran would essentially not be viable. The Tribunal weighs this consideration in favour of the revocation of the cancellation of the Applicant's visa.

258. In relation to the other consideration pertaining to the impact on victims, the Tribunal gives it neutral weighting. The only victim of any offending which the Tribunal has information pertaining to is the Applicant's partner, who stated at the Tribunal's hearing and in her statement that she forgives him and wishes to reunite with him, and their young children, as a priority. The Tribunal accepts the Applicant's partner has forgiven him and does not fear

him. However, the Tribunal considers this evidence as relevant to primary consideration 3 pertaining to the Applicant's strength, duration and ties to Australia. The Tribunal has weighed this evidence in the Applicant's favour in that consideration rather than the impact on victims.

259. Finally, in relation to the other consideration pertaining to the impact on Australian business interests, the Tribunal has given it no weight either in favour or against cancellation. There is no evidence or claim that non-revocation of the cancellation of the Applicant's visa will either impact on Australia's business interests or significantly compromise the delivery of a major project or delivery of an important service in Australia.

260. It is necessary to weigh up all of the primary and other considerations:

- Primary consideration 1 weighs heavily against revocation.
- Primary consideration 2 weighs heavily against revocation.
- Primary consideration 3 weighs heavily in favour of revocation.
- Primary consideration 4 weighs heavily in favour of revocation.
- Primary consideration 5 weighs against revocation
- Other considerations (a) and (b) are in favour of revocation.
- Other considerations (c) and (d) are neutral.

261. The Tribunal would agree with the Applicant's counsel Dr Donnelly that *"this is a finely balanced case"* . The primary considerations of the protection of the Australian community, family violence and the expectations of the Australian community all weigh against the Applicant, some heavily, and are in favour of the cancellation of his visa. Ultimately however the Tribunal considers these considerations are very narrowly and very marginally outweighed by the countervailing considerations of the Applicant's strength, nature and ties to Australia through his Australian citizen partner, and the best interests of the child in relation to his two young Australian citizen children. Furthermore, the Tribunal has attributed

weight to the other considerations pertaining to the impediments to removing the Applicant, and importantly the legal consequences of the decision, particularly in a situation whereby it is at least possible or even probably that the Applicant may be owed international non-refoulment obligations. There is no prospect of returning him to Iran, and indefinite detention is a possibility.

262. The Tribunal notes the Applicant's past long record of offending, particularly in the distasteful and reprehensible area of family violence. The Tribunal notes his statements of remorse, his claims he has genuinely changed after his rehabilitation, and his commitment to do better by his partner in the future. The Applicant is clearly on notice: this decision in the Applicant's favour was very marginal. The Tribunal notes that any future reoffending may see his visa again cancelled, whereby a future decision maker may not afford the Applicant the same latitude and another chance at redemption.

263. The Tribunal finds that there is 'another reason' why the Mandatory Visa Cancellation should be revoked.

264. Having regard to all the relevant circumstances, the Tribunal finds the preferable decision is to set aside the reviewable decision and substitutes a decision that the mandatory cancellation of the Class XB Subclass 200 Refugee (Permanent) visa is revoked.

DECISION

265. The Tribunal sets aside the reviewable decision and substitutes a decision that the mandatory cancellation of the Class XB Subclass 200 Refugee (Permanent) visa is revoked.

I certify that the preceding two hundred and sixty-five (265) paragraphs are a true copy of the reasons for the decision herein of Deputy President Justin Owen.

.....[SGD].....

Associate

Dated: 01 September 2023

Date of hearing:	**14 August 2023**
Representative for the Applicant:	**Dr J Donnelly, Counsel**
Representative for the Respondent:	**Ms C Lewis, Australian Government Solicitors**

APPLICANTS LIST OF OFFENDING

Date of offence	Date of conviction	Offence	Sentence
29/07/2007	23/09/2008	Behave in riotous manner in public place	With conviction, fined an aggregate of $800
		Use threatening words in public place	
01/01/2008	27/01/2009	Recklessly cause injury	With conviction, fined $650
15/08/2015	20/11/2015	Drive motor vehicle while licence suspended – 1st off	Bond s 10: 18 months
08/12/2018	22/02/2019 Call up: 05/02/2020 Call up: 22/03/2021 Call up: 25/03/2022	Common assault (DV)-T2	Community Correction Order: 2 years Call up 2022: Imprisonment (aggregate): 12 months
		Contravene prohibition/restriction in AVO (Domestic)	Fine: $1,000 Community Correction Order: 2 years Call up 2022: Imprisonment (aggregate): 12 months
01/05/2019	05/02/2020 Call up: 22/03/2021 Call up: 25/03/2022	Contravene prohibition/restriction in AVO (Domestic)	Community Correction Order: 2 years Call up 2022: Imprisonment (aggregate): 12 months
		Destroy or damage property	Community Correction Order: 2 years Call up 2022: Imprisonment (aggregate): 12 months
04/05/2020	17/06/2020	Possess prohibited drug	Fine: $400
31/07/2020	11/11/2020	Possess prohibited drug	Fine: $150
19/09/2020		Possess prohibited drug	Fine: $400
26/06/2020	22/03/2021	Goods suspected stolen given other not entitled (not m/v)	Community Correction Order: 12 months
		Make/furnish a statement which is false/misleading	S 10A conviction
11/03/2021		Contravene prohibition/restriction in AVO (Domestic)	Imprisonment: 6 months
08/03/2021		Contravene prohibition/restriction in AVO (Domestic)	Imprisonment: 1 month

12/02/2021- 13/02/2021		Contravene prohibition/restriction in AVO (Domestic)	Imprisonment: 4 months
14/01/2022	04/03/2022	Common assault (DV)-T2	Fine: $750
	04/03/2022 Call up: 25/03/2022	Destroy or damage property <=$2000 (DV)-T2	Community Correction Order: 9 months Call up: Imprisonment (aggregate): 12 months
		Contravene prohibition/restriction in AVO (Domestic)	Fine: $500
		Stalk/intimidate intend fear physical etc harm (domestic)- T2	Community Correction Order: 18 months Call up: Imprisonment (aggregate): 12 months
24/03/2022	25/03/2022	Contravene prohibition/restriction in AVO (Domestic)	Imprisonment (aggregate): 12 months